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REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

AT THE OCTOBER TERM, 1896, OF THE FIRST DISTRICT, AND THE MAY
AND DECEMBER TERMS, 1896, OF THE SECOND DISTRICT

VOL. LXVIII

REPORTED BY
MARTIN L. NEWELL
OF THE SPRINGFIELD BAR

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THE APPELLATE COURTS OF ILLINOIS

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

MARTIN L. NEWELL, Reporter, Springfield, Illinois.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Thomas N. Jamieson, Ashland Block, Chicago.

JUSTICES.

JOSEPH E. GARY, Ashland Block, Chicago.

ARBA N. WATERMAN, " " "

HENRY M. SHEPARD, " " "

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, LaSalle county, on the third Tuesday in May, and the first Tuesday in December.

CLERK—Columbus C. Duffy, Ottawa, LaSalle county.

JUSTICES.

LYMAN LACEY, Havana, Mason county.

OLIVER A. HARKER, Carbondale, Jackson county.

JOHN D. CRABTREE, Dixon, Lee county.

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

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JUSTICES.

GEORGE W. PLEASANTS, Rock Island, Rock Island county.

GEORGE W. WALL, Du Quoin, Perry county.

CARROLL C. BOGGS, Fairfield, Wayne county.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.

CLERK—Frank W. Havill, Mount Vernon, Jefferson county.

JUSTICES.

NATHANIEL W. GREEN, Pekin, Tazewell county.

CHARLES J. SCOFIELD, Carthage, Hancock county.

ALFRED SAMPLE, Paxton, Ford county.

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APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1896.

**William A. Paulsen and Junius V. Paulsen v. Charles
C. Haskin, Clark B. Samson, Trustee, and
Mary A. Nash.**

1. **FRAUD—*Relief Against, Affirmatively and by Way of Defense.***—A traded the plant and property of a manufacturing company to B in exchange for real estate, to which there were trust deeds to C and D, A assuming and agreeing to pay the notes secured by said trust deeds. At a subsequent date A sold the property he had secured to E, and later C commenced foreclosure proceedings under his trust deed. D filed a cross-bill in this suit, praying that A and B be decreed to pay the amount found to be due to him, and that his trust deed be foreclosed, and A and E filed an answer to such cross-bill, and a cross-bill of their own, both alleging that the trust deed to D was made in order to raise money to pay certain debts of the manufacturing company for which E was personally liable; that said debts had not been paid; that D had knowledge of this agreement, and that he paid nothing for his trust deed or the note secured thereby; the cross-bill also prayed that the note and trust deed held by D might be declared null and void as between B and D, and be held for naught as against A and as a lien upon the property. *Held*, that A and E were not entitled to the affirmative relief asked by their cross-bill, but that the facts alleged were, if proved, a good defense against the cross-bill of D.

Foreclosure Proceedings.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Affirmed in part and reversed in part. Opinion filed January 7, 1897.

THOMAS J. HOLMES, attorney for appellants.

SAMSON & WILCOX, attorneys for Charles C. Haskin and Clark B. Samson, trustee, appellees.

GEORGE W. BROWN, attorney for Mary A. Nash, appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellees, Haskin as owner of a note for \$1,000, made by one Powers, and Samson as trustee in a trust deed made by Powers to secure said note, united in a bill to foreclose said trust deed. The trust deed was subject to a prior one upon the same premises, for \$28,000, and the premises were what are known as the "Chautauqua Flats."

George W. Brown, as trustee in a subsequent trust deed, made by said Becker to secure his note for \$5,000, dated October 9, 1895, and payable sixty days after date, and the appellee Mary A. Nash, who was the holder of said note, were among the defendants to the bill, as was also the appellant William A. Paulsen.

Said Mary A. Nash answered and set up that she was interested in the premises by being the legal holder and owner of said \$5,000 note, and asked to have the amount due thereon included in the decree of sale. She also filed her cross-bill to foreclose the trust deed from Becker to Brown, which was given to secure said note, and alleged that said W. A. Paulsen had, in part consideration of the conveyance to him of the premises, assumed and agreed to pay said note, and prayed, among other things, that Becker and Paulsen be decreed to pay to her whatever sum might be found to be due on the note.

Afterward the two appellants, William A. Paulsen and Junius V. Paulsen, both of whom were parties defendant to the cross-bill of Mary A. Nash, and answered the same, filed their cross-bill praying that said \$5,000 note and trust deed might be declared null and void as between the maker

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thereof, Becker, and said Mary A. Nash, and be held for naught as against said William A. Paulsen, and as a lien against the premises, and might be canceled.

The allegations of the cross-bill of the Paulsens, which form the basis for the relief asked by it, can not be more briefly and satisfactorily stated than by quoting from the abstract, as follows:

“Sets forth filing of original and cross-bill; also that interest of Junius V. Paulsen in premises described in bill and cross-bill of Mary A. Nash he derived through quit-claim deed from his brother, W. A. Paulsen, for good and valuable consideration, recorded, etc., in Cook county, Illinois; that W. A. Paulsen obtained title to same premises through warranty deed from Louis A. Becker and wife, recorded, etc., in Cook county, Illinois; that at the time of the conveyance to said Paulsen the same were then incumbered by the trust deed to Clark B. Samson, trustee, described in original bill; that said premises were also incumbered by a prior trust deed to one John J. Knickerbocker, trustee, securing note of \$28,000; that W. A. Paulsen received said premises from Louis A. Becker in exchange for certain property belonging to, and the plant of, the Spring Motor Co., at Dixon, Illinois; that at time of making exchange, Louis A. Becker was not the real owner of said premises known as Chautauqua Flats; Thos. C. Nash, his father-in-law, was real owner; that title was allowed to remain in said Becker for sake of convenience; that at time of exchange of said properties there were debts due and owing from Spring Motor Co. to various creditors, for which the said J. V. Paulsen was personally liable, together with said company; that as part of consideration for said exchange, it was agreed between W. A. Paulsen, Thomas C. Nash and Louis A. Becker, that \$5,000 note and trust deed, sought to be foreclosed in cross-bill of Mary A. Nash, be executed by said Becker, and that said note and trust deed should be hypothecated by said Becker and with proceeds pay off the indebtedness against said Spring Motor Co., and thereby release said J. V. Paulsen from liability for same, which

was part of consideration for the whole transaction, and which note and trust deed, in consideration thereof, said W. A. Paulsen assumed to pay, together with said \$1,000 note, mentioned in original bill, as well as \$28,000 note and trust deed to Jno. J. Knickerbocker, trustee; that it was expressly agreed between said Becker and W. A. Paulsen and there was absolutely no consideration for said \$5,000 note and trust deed passing to said Becker, but as part of consideration of whole transaction said note and trust deed were given with the express understanding and agreement that same should be sold and with the proceeds said Becker was to pay off the indebtedness of said Spring Motor Co., as aforesaid, which was part of consideration for exchange of property and plant belonging to said Spring Motor Co. for premises described in bill and cross-bill of Mary A. Nash; that in this way money could be obtained at once with which to pay said indebtedness, and give your orator, W. A. Paulsen, the time specified in said note to pay same, and at the same time be freed from the personal liability for said indebtedness of Spring Motor Co.; that Mary A. Nash, mother-in-law of said Becker, knew that said note and trust deed were without consideration, and the purpose for which the same were made, and was informed and knew of the whole transaction relating to trade between said Becker and W. A. Paulsen, and terms upon which said exchange was made; that at time the warranty deed was executed and delivered by said Becker to W. A. Paulsen, said Becker did not deliver possession of said premises to your orator, W. A. Paulsen, but refused so to do, and remained in possession thereof, collecting rents and appropriating the same to his own use, up to December 15, 1895, and that afterward the property was placed in the hands of the receiver in this case, and that said receiver, Chicago Title and Trust Co., is now in possession thereof, receiving and collecting rents, etc.; that when said note and trust deed were executed, your orators were not informed as to true date thereof and the time the same were to run, until said note had run sixty days, and when orators discovered that note ran for so short a time they requested of

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said Becker that he extend the note one year, so that note might be more readily sold, and that it was expressly agreed between said Thomas C. Nash, Louis A. Becker and your orator W. A. Paulsen, that said note should be extended one year, and that such extension should be indorsed upon back of note. Orators further show that said Becker and Nash did not do as they agreed and extend time of payment of said note in writing, but did orally extend time of payment, by reason of which said note is not yet due.

Orators say that said Becker did not dispose of said \$5,000 note and trust deed, and with proceeds pay off said indebtedness of Spring Motor Co., but wholly refused to do so, nor has said Becker in any way made an effort to pay same as agreed and still refuses to pay same, and refuses to in any way carry out his said agreement; that only purpose for making said note and trust deed was for purposes aforesaid; that as between said Becker and Mary A. Nash there is absolutely no consideration for said note and trust deed, and was so understood and agreed between said Becker and Nash, and that none of indebtedness aforesaid has been paid by said Becker or Nash, nor have they in any way attempted to carry out their agreement to raise said money and pay said indebtedness and consummate the trade between said Becker, Mary A. and Thomas C. Nash, and your orator W. A. Paulsen, said Thomas C. Nash being the real owner of said premises, as hereinbefore stated. Orators show and charge the fact to be that said Becker and Mary A. Nash, conspiring to cheat and defraud your orators, caused said note and trust deed to be transferred and assigned to said Mary A. Nash and by her held until the same became due, and then filed her said cross-bill to foreclose same and enforce the payment of said note, and declare the same a valid lien on said premises; that said Mary A. Nash now admits that no consideration passed between her and said Becker for making of said note, but notwithstanding that fact she, said Mary A. Nash, is now trying to compel your orator W. A. Paulsen to pay same and declare same to be a valid lien on said premises; that indebtedness of said Spring

Motor Co. still remains unpaid; that orator Junius V. Paulsen has been sued at law for a large amount of said indebtedness; that he is being pressed by creditors for payment thereof; that said J. V. Paulsen will be compelled to pay said indebtedness on account of the failure of said Becker to pay same as per said agreement, and on account of failure of said Becker and Mary A. Nash to comply with their agreement, your orators have refused to pay said note. Further, orators say that said Louis A. Becker is now in possession of property belonging to said Spring Motor Co.; that he has in no way carried out said agreement; that orator J. V. Paulsen is being annoyed and harassed by creditors of said company, and that said Becker and Mary A. Nash, intending to defeat and defraud your orators, now seek in said cross-bill, to foreclose said note and trust deed."

To this cross-bill demurrers by both Mary A. Nash and by the original complainants were sustained.

Such action was clearly right as to the original complainants against whom the cross-bill asked no relief, and who were in no manner concerned with the issues raised by it. And it was not error to sustain the demurrer of Mary A. Nash. The Paulsens were not entitled to the affirmative relief they asked, except by a rescission of the entire contract, although they might be in a position where they could defend from affirmative relief against themselves without a rescission. The joint and several answer of the Paulsens to the cross-bill of Mary A. Nash set up substantially the same facts as did their cross-bill. But the master refused to admit any evidence that was offered by the appellants in support of their answer, and the court sustained the master's report. The important question then is, do the facts as set up in the cross-bill quoted from, which constitute in substance the defense set up in the answer, make out a meritorious defense?

If the answer be true, the only consideration for Paulsen assuming the additional incumbrance of \$5,000 on the premises, was to enable Becker, by means of that incumbrance,

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to raise money by a sale of the note to pay debts against the property traded to him, and for which the Paulsens, or one of them, were liable.

This, Becker has not done, and both he and Mary A. Nash refuse to do. W. A. Paulsen, by assuming and agreeing to pay this note as a part of the purchase price which he agreed to pay for the flats, will be required to pay five thousand dollars more than his contract price, if neither Becker nor Nash pay the debts agreed to be paid from the proceeds of the note; and if, as alleged, Mary A. Nash paid no consideration to Becker for the note, she should not be permitted to foreclose for it until, at least, she shall apply the amount of it to paying said debts.

We think it was error to refuse to permit the Paulsens to prove, if they could, the defense they had set up in their answer, and the decree, in so far as it orders a sale and foreclosure under the cross-bill of Mary A. Nash, is reversed and the cause remanded, but in all other respects the decree is affirmed.

P. J. Neary v. Charles Bohannon.

1. **GARNISHMENT—Duty of Garnishee to Defend Property.**—A garnishee in an attachment suit answered that he had in his possession certain property which he supposed belonged to the defendant in the attachment, and that such property had been replevied. He was not requested to and did not defend the replevin suit and judgment was rendered against him. *Held*, that the answer of garnishee was sufficient to relieve him from liability to the plaintiff in the attachment, for a failure to defend the replevin suit.

Garnishment.—Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

A. P. WILLIAMS and WILLIAMS & KRAFT, attorneys for appellant.

WHITE & SHAW, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

In March, 1895, the appellant commenced a suit by attachment against one Percy C. Hamilton, and summoned the appellee as garnishee.

April 4, 1895, he answered that he had in his possession four carriages, and made a somewhat complicated statement as to the ownership of them, which, for the purposes of this opinion, we will regard as an acknowledgment that he supposed that Hamilton owned them.

The answer also stated that the "carriages were replevined March 26th, 1895," giving the title of the suit in the Superior Court, and that they were still in his possession.

April 25, 1895, the sheriff executed the replevin writ by taking the carriages and reading the writ to the appellee.

Nobody defended the replevin suit, and October 1, 1895, judgment was entered in it, that the plaintiff therein retain the property.

The question now in this case is: Is the appellee responsible to the appellant, to the extent of his debt against Hamilton, for not defending the replevin suit? The Superior Court decided—as we hold rightly—in the negative.

The appellee had no interest in the carriages, and his answer so advised the appellant. The benefit of a successful defense of the replevin suit would have accrued to the appellant. He might have defended in the name of the appellee, by indemnifying him against costs. 2 Am. & Eng. Ency. of Law, 2d Ed., 1089.

Although the statements in the answer that the carriages had been "replevined," and were still in the possession of the appellee, were apparently inconsistent, yet they gave notice of the pendency of the replevin suit. Notice was enough—without request to defend—to make the risk of the event of the replevin suit fall on the appellant. *Drennan v. Bunn*, 124 Ill. 175.

We had some difficulty in finding any assignment of errors here.

The record has seventy-five pages, preceding the certificate of the clerk that the "foregoing" is "a true, perfect

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and complete transcript of the record except the bill of exceptions, the original of which is by stipulation of parties incorporated herein." Following the certificate is the assignment of errors. Then follows a stipulation, entitled both in the Superior Court and in this court. The stipulation is entitled *Neary v. Hamilton*. Then follows a paper which we have no doubt was intended as a bill of exceptions, (though it has no beginning to show that it presents the history of any trial,) which concludes in due form, and is signed and sealed by the judge. That paper does not appear to have been filed in the Superior Court.

If the merits of the cause—treating the contents of that paper as record—were with the appellant, we could not reverse.

The judgment is affirmed.

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1. CORPORATIONS—*Meetings Outside of the State*.—Sec. 20 of Chap. 82, R. S., plainly and explicitly pronounces void the action of the directors of a corporation at a meeting held outside of the State, unless such meeting was authorized or its acts ratified by a vote of two-thirds of the directors, trustees, or officers corresponding to trustees, at a regular meeting.

2. SAME—*Power of Officers to Dispose of Property*.—The president and secretary of a packing company have not, by virtue of their offices, authority to transfer substantially all the property of the corporation to certain creditors by way of preference to them; and the company is not bound by and may avoid such a conveyance.

3. SAME—*May Give Preference to Creditors*.—In this State a corporation, although insolvent, may, by a conveyance of its property, prefer one of its creditors, subject to the same restrictions that apply to individual debtors.

4. ATTACHMENTS—*Invalid Mortgages*.—An attaching creditor secures whatever right his debtor has in and to the property seized, and a mortgage on such property which is void as to the debtor is also void as to the attaching creditor.

5. SAME—*Right of Third Parties to Question a Judgment*.—A de-

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fendant in an attachment suit is not bound to contest the truth of the affidavit setting forth the grounds for attachment, and another creditor of such defendant, who knew of and could have intervened in the attachment proceeding, can not question the judgment on that point in another suit regarding the property attached

6. **ESTOPPEL**—*To Deny Validity of Mortgage*.—Where a mortgage is given, not for anything received by the mortgagor at the time of its execution, or any detriment then suffered by the mortgagee, but to secure a debt that has long existed, the mortgagor is not the recipient of such benefits under such mortgage that he will be estopped to deny the validity thereof.

7. **BURDEN OF PROOF**—*Is on Creditor Claiming Preference*.—When a creditor comes into court, claiming a preference over other creditors of his debtor, the burden is upon him to establish the validity of the acts under which such claim is made.

Mortgage Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1896. - Affirmed in part, and reversed in part. Opinion filed December 28, 1896.

STATEMENT OF THE CASE.

This was a suit to foreclose a mortgage brought in the Circuit Court of Cook County, Illinois, by the State National Bank of St. Joseph, the appellant, upon real estate situated in the city of Chicago, owned by the John Moran Packing Company, mortgagor, a corporation, incorporated under the laws of the State of Illinois, doing a packing business at St. Joseph, Missouri.

The Union National Bank of Chicago, and the Atlas National Bank of Chicago, attaching creditors, were defendants. By answer and cross-bill of the former, and by answer of the latter, it was contended that the mortgage was invalid because authorized by only three of the five members of the board of directors of the mortgagor company at a meeting held outside of the State of Illinois. The defendant banks also contended that the John Moran Packing Company was at that time insolvent, and that the giving of the mortgage under the circumstances operated as an unlawful preference which should not be enforced against the later attachment liens, and further contended that the

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description of the mortgaged premises was insufficient to convey the premises.

Prior to October 20, 1894, the defendant, John Moran, was the owner of a packing plant situated in St. Joseph, Missouri, which he was then operating, and was also the owner of an equity of redemption in real estate located in Chicago, being the premises in question in this suit. Upon these premises was a trust deed dated March 12, 1892, to William H. Matthews, trustee, securing an unpaid balance of over fifteen thousand dollars. In carrying on his packing business Moran was borrowing from time to time large sums of money from the State National Bank of St. Joseph, the complainant.

In October, 1894, the John Moran Packing Company was incorporated under the laws of the State of Illinois, with a capital stock of one hundred and fifty thousand dollars, the number of shares being 1,500, and the par value of each share \$100.

John Moran became and still is president of the John Moran Packing Company, and C. W. Taylor was elected secretary.

Soon after the complete organization of the John Moran Packing Company, John Moran sold and transferred to it his packing plant in St. Joseph, Missouri, together with his entire business there, his bills and accounts receivable, good will, etc., and also his equity in his above described mortgaged premises situated in Chicago, for the nominal sum of \$150,000, and the Packing company assumed all his liabilities growing out of the said packing business, including the aforesaid advances made to him by the complainant.

In payment, John Moran received 1,139 shares of stock in the John Moran Packing Company at a valuation of \$113,900, and due bills or orders of the company for the remaining \$36,100. So far as it appears he continued to own that number of shares at all times since he so acquired them.

Among the liabilities so assumed by the John Moran Pack-

ing Company was an indebtedness to complainant of \$50,000 for moneys advanced to Moran as before stated, which became due in November, 1894. On November 8, 1894, two new notes for \$25,000 each, payable in three and four months respectively from date, were executed by the John Moran Packing Company to the order of complainant to take up the said indebtedness. These two notes of \$25,000 each were indorsed by John Moran, and are the notes secured by complainant's mortgage sought to be foreclosed by complainant's bill.

The mortgage in question was not executed until February following, however.

Among the other liabilities of Moran assumed by the John Moran Packing Company was a contract between John Moran and the St. Joseph Stock Yards and Terminal Company, dated June 25, 1894.

On January 23, 1895, the John Moran Packing Co. entered into an agreement with one C. M. France (a nephew of C. B. France, who was then president of the State National Bank), whereby certain portions of the packing company's packing house, at St. Joseph, were leased to him to be used for the storage of meat products, lard and other products from slaughtered animals, etc., the John Moran Packing Company to warehouse its products, keep said warehouses at the right temperature, etc.; said C. M. France to act as warehouseman, issue warehouse receipts for products stored, furnish all necessary weighers therefor and keep all necessary accounts, all at his own cost and expense; for which he was to be paid \$300 per month by the John Moran Packing Company.

Business began under this agreement at once, and the result was that the State National Bank during its continuance advanced the John Moran Packing Company a large amount of money upon warehouse receipts issued by the warehouseman, C. M. France, at various times upon pork products.

These advances upon collateral were entirely distinct from the moneys covered by the two promissory notes of

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\$25,000 each first mentioned. They were loans of new capital by the State National Bank.

This course of business continued up to the middle of February, 1895. One of the notes for \$25,000 to complainant being then past due and wholly unpaid, and complainant demanding security, the company then owing about \$160,000, a meeting of the board of directors of the John Moran Packing Company was, after notice to each director, held at St. Joseph, Missouri, on the 18th day of February, 1895. Three of the five members of the board of directors, namely, John Moran, C. W. Taylor and P. Fogarty, were present at the meeting and voted in favor of the following resolution:

“Resolved, that the president and secretary be and they are hereby instructed to execute deeds in the nature of mortgages upon all property of the company situated in this State and in Illinois, for the purpose of securing the payment of two notes, made by this company to the State National Bank on the eighth day of November, 1894, for \$25,000 each, and also for the purpose of securing and carrying out the contract with the St. Joseph Stock Yards and Terminal Company, made by John Moran on the twenty-fifth day of June, 1894, assumed by this company, that is to say:”

The resolution sets out *in haec verba*—

A deed from the company to John Donovan, Jr., trustee for the State National Bank, covering all its real estate, and all its machinery, tools and other personal property at St. Joseph, Missouri.

A mortgage by the Packing Company to the same bank upon its real estate in Cook county, Illinois.

A deed by the Packing Company to the St. Joseph Stock Yards and Terminal Company, to secure a contract between the Packing Company and the Stock Yards Company in reference to packing a certain number of hogs per year, this deed also covering the same property in Missouri covered by the foregoing deed to the State National Bank, and being made expressly subject to it.

Also a deed from the Packing Company to the Stock

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Yards Company, to secure the same contract, and covering the same property in Cook county which is included in the foregoing mortgage to the State National Bank, and being made subject to said mortgage.

These deeds cover all the property in Illinois and Missouri, being all the assets of the company, except some pork products covered by warehouse receipts which were then held by the State National Bank.

The president and secretary, under the corporate seal, thereupon executed the mortgage sought to be foreclosed by complainant herein, dated February 18, 1895, securing the two promissory notes mentioned, which mortgage was duly acknowledged on the same day, and afterward recorded in the recorder's office of Cook county, Illinois, on February 19, 1895, at 9:55 o'clock A. M.

At the same time the foregoing mortgage was given, the president and secretary, under the corporate seal, executed the other mortgage mentioned in the said resolution, which mortgages were duly acknowledged, and recorded at the same time as complainant's mortgages.

John Moran and wife, on February 16, 1895, also executed a mortgage to the State National Bank to secure the same notes covered by the mortgages from the corporation, conveying certain real estate owned by him and located in Cook county, Illinois, and at the same time executed a mortgage to the St. Joseph Stock Yards & Terminal Company conveying the same premises, to secure the before mentioned contract. These individual mortgages were recorded at the same time as the mortgages from the corporation.

On the same day that the mortgages to complainant and the mortgages to the Terminal company were recorded in Cook county, *i. e.*, on February 19, 1895, but several hours thereafter, the defendant, Union National Bank of Chicago, began an attachment suit in the Superior Court of Cook County, Illinois, against the John Moran Packing Company, upon the ground, as stated in the affidavit for attachment, that defendant had, within two years last past, fraudulently conveyed or assigned its property, etc., and was about, fraud-

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ulently, to conceal, assign or otherwise dispose of its property. The writ was levied upon the premises in question and a certificate of levy filed by the sheriff in the recorder's office of Cook county, on the 19th day of February, 1895, at 3:30 o'clock p. m.

On March 25, 1895, a meeting of the board of directors of the John Moran Packing Company was, after notice to all of the directors, held at the general office of the company, at Chicago, Illinois. At this meeting of the board of directors there were present four members of the board, namely, John Moran, C. W. Taylor, P. Fogarty and W. T. Nash. A resolution ratifying and approving the acts and resolutions ordered at the meeting held on February 18, 1895, and directing the president and secretary to execute new deeds upon the same trusts and for the same purposes as the deeds ordered and executed on February 18, 1895, by way of further assurance, was carried by an affirmative vote of three directors, namely, Mr. Moran, Mr. Taylor and Mr. Fogarty. Mr. Nash voted against the resolution.

Acting under this resolution, the John Moran Packing Company, by its president and secretary, and under its corporate seal, executed the mortgage to complainant, dated March 25, 1895, securing the same notes described in complainant's mortgage, dated February 18, 1895, which mortgage was duly acknowledged, received and accepted by complainant without waiving or relinquishing the mortgage first mentioned or the lien created thereby, and was recorded in Cook county, Illinois, on March 26, 1895. This mortgage was also set forth in complainant's bill, and is sought to be foreclosed thereby.

On the same day, and acting under the above resolution, the John Moran Packing Company, by its president and secretary, and under its corporate seal, also executed a mortgage to the St. Joseph Stock Yards & Terminal Company, dated March 25, 1895, securing the same contract mentioned in the former mortgage to it, dated February 18, 1895. This mortgage was also accepted by the Terminal company upon like terms and conditions as complainant's mortgage, and was recorded at the same time.

So far as appears, neither the John Moran Packing Company, its officers, directors, nor its stockholders, ever questioned the validity of the mortgages executed on February 18, 1895, to complainant and to the Terminal company, or questioned the validity of the ratifying mortgages, executed on the 25th day of March, 1895, until the filing of its answer in this case, which contained the following:

"The said John Moran admits that certain instruments, to wit, certain supposed promissory notes and a certain mortgage were executed in behalf of the said John Moran Packing Company, and delivered to the said complainant, to secure a certain supposed indebtedness of said company to the said complainant, but these defendants deny that the said instruments, or either of them, were or are as alleged in the said bill of complaint, and ask that strict proof be had of the same in this court, and they deny that the said Packing company was or is indebted to the said complainant, in the sum alleged in the said bill."

The validity of said mortgages was not called in question, except by the Union National Bank and the Atlas National Bank until after the commencement of this suit.

The attachment suit of the Atlas National Bank was not begun and levied until April 26, 1895, after the execution and delivery of the mortgage given in ratification of the mortgages of February 18, 1895.

After the execution of the mortgages dated February 18, 1895, the John Moran Packing Company continued in possession and control of all of the property which it had mortgaged to complainant, and as late as July 13, 1895, passed a resolution, three directors voting therefor, directing the officers of the company to convey the Chicago premises, *i. e.*, the premises in question in this suit, to the defendant, Walter C. Hatley, for \$28,000, subject to the Matthews trust deed, and also passed resolutions directing the officers to lease portions of the St. Joseph property to Kate Moran, and to sell and convey certain other property to John Moran. It does not appear that complainant has at any time since it received its first mortgage, up to the present time, had any

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interest in the Chicago premises other than its mortgage lien, nor exercised any control over it. Nor does it appear that complainant had any control over the St. Joseph property or any interest therein other than its mortgage lien.

After February 18, 1895, all live stock that was slaughtered by the John Moran Packing Company was purchased for and in the name of C. B. France, president of the State National Bank, with money furnished by him; the live stock was slaughtered by the John Moran Packing Company and placed in cold storage in that portion of the packing plant premises which had been rented to C. M. France as warehouseman, the January before. The packing company from time to time gave C. B. France checks of the John Moran Packing Company countersigned by the warehouseman, in payment of the manufactured product so stored, and such product became the property of the John Moran Packing Company. The warehouseman then issued warehouse receipts to the John Moran Packing Company upon this product, which receipts were by the Packing company put up with complainant as collateral security for additional advances to pay C. B. France, and for other purposes, the Packing company retaining title to the product, and it is to be presumed, disposing of it for its own profit.

This procedure continued until August, 1895, when, the business not proving profitable, the John Moran Packing Company ceased doing business. During all this period the officers of the company continued to receive salaries, which were paid by the Packing company.

The attachment suit of the Union National Bank of Chicago, begun on the 19th day of February, 1895, was based upon an indebtedness of \$25,483, evidenced by the demand note of the John Moran Packing Company, dated February 18, 1895, for that amount. Personal service was had upon the Packing company, which appeared in the suit in due time and filed a plea, duly verified, denying the grounds of the attachment.

On December 14, 1895, a stipulation was entered into between the Union National Bank and the John Moran

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Packing Company, and filed in the attachment suit, wherein it was agreed that the plea to the attachment writ should be withdrawn, and that a judgment be entered therein for the sum of \$26,233.76, and that general execution against the defendant issue, and also special execution against the property attached. Judgment was entered accordingly on that day and an execution issued on the 16th day of December, 1895, placed in the hands of the sheriff, and afterward returned "no part satisfied." The John Moran Packing Company also filed a plea to the writ in the attachment suit of the Atlas National Bank of Chicago. That suit is still pending and undetermined.

On December 26, 1895, complainant filed its bill to foreclose, and made the John Moran Packing Company, John Moran, Kate Moran, his wife, Union National Bank of Chicago, Atlas National Bank of Chicago, St. Joseph Stock Yards & Terminal Company, Walter C. Hately and John A. Bunnell, defendants thereto—the said John Moran a defendant as indorser before delivery of the two promissory notes secured by complainant's mortgage, sought to be foreclosed, and the other parties defendants as purchasers, mortgagees, attaching creditors or otherwise, which interests, if any, the bill alleged, accrued subsequent to the lien of complainant's mortgage and were subject and inferior thereto.

Complainant's bill also alleged, among other things, that, under the laws of the State of Missouri, the defendant, John Moran, was liable upon the notes mentioned as a maker, and that under the statute of Missouri, in force at the time of the execution of the notes, eight per cent interest might be contracted for. It also set out the informality of the description of the premises in complainant's mortgage of February 18, 1895, and the execution of the mortgage, dated March 25, 1895, which it alleged was given and accepted by way of ratification and confirmation of said first mortgage without waiving or relinquishing its rights under said first mortgage, and contained the usual prayer for the foreclosure of its mortgages and the sale of the premises.

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Answers were filed by the respective defendants, and the defendant Union National Bank, filed a cross-bill. Answers were filed to the cross-bill by complainant and by the defendants except the John Moran Packing Company, John Moran and Kate Moran. Replications were filed to the answers to complainant's bill, and to the answers to the cross-bill.

The answer and cross-bill of The Union National Bank averred that the mortgages dated February 18, 1895, were invalid because authorized by only three of the five directors of the John Moran Packing Company, at a meeting held outside of the State of Illinois, and also because the John Moran Packing Company was at the time insolvent and in failing circumstances, and had determined to turn over its property to its creditors, and that complainant's mortgage was one of a series of deeds, mortgages and bills of sale executed by the president of the company for the purpose of giving preference to complainant, and to himself, as surety upon the notes secured by complainant's mortgage; that the mortgages of March 25, 1895, given by way of ratification, were of no avail because not authorized by two-thirds of the members of the board of directors of the John Moran Packing Company, and because the levy of its attachment writ upon the premises in question had been made prior to the date of ratification.

The Atlas National Bank also contended that complainant's mortgage dated February 18, 1895, and the one dated March 25, 1895, were both invalid because not legally authorized by the board of directors of the John Moran Packing Company.

Complainant contended that its mortgage of February 18, 1895, was valid and given to secure a *bona fide* indebtedness of the mortgagor; that neither the John Moran Packing Company nor its stockholders had ever denied the validity of the mortgage, but on the contrary had ratified it, and were estopped from denying its validity after having received the benefit of the loan secured thereby, and that attaching creditors having no greater rights than the mortgagor were also estopped.

That the mortgage was, at most, not void, but only voidable by reason of any informality in its execution, and its execution could not be called in question by any one except the corporation or its members, and that the attaching creditors could not take advantage of any mere irregularity in the execution of the mortgage.

That the mortgage of February 18, 1895, was legally ratified by the resolution of March 25, 1895.

That the lien of the attachment of the Union National Bank was released by the stipulation withdrawing the plea in abatement and taking judgment by agreement.

After having obtained judgment against the packing company on December 14, 1895, in the manner stated, the Union National Bank began an attachment suit against John Moran individually, on December 14, 1895, in the Superior Court of Cook County, and levied upon the real estate owned by him individually, located at Chicago, covered by his individual mortgages to complainant, and to the St. Joseph Stock Yards & Terminal Co., dated February 16, 1895, before mentioned. The basis of this suit was the guaranty by John Moran of the before mentioned indebtedness of the Packing company to the Union National Bank. Judgment by default was taken in February, 1896.

The State National Bank of St. Joseph, the complainant, on December 27, 1895, also filed a bill to foreclose Moran's individual mortgage in the Circuit Court of Cook County, and made John Moran, Kate Moran, The St. Joseph Stock Yards & Terminal Co., and the Union National Bank, parties defendant.

In the suit against the John Moran Packing Co., the court found that complainant's mortgage of February 18, 1895, and the mortgage to the St. Joseph Stock Yards & Terminal Co., although prior to the attachment of the Union National Bank and the attachment of the Atlas National Bank, in point of time, were not executed according to law, were not the deeds of the corporation, and were therefore illegal and void as against said attaching creditors, and should, as against them, be set aside and annulled.

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That the respective mortgages to complainant and said St. Joseph Stock Yards & Terminal Co., dated March 25, 1895, were subsequent in point of time to the attachment of the Union National Bank, and were inferior thereto, and that as to the Atlas National Bank they were illegal and void because not authorized by the board of directors of the Packing company, and constituted clouds upon the lien of the Atlas National Bank.

That there was due to the complainant from the John Moran Packing Company, upon its mortgage, the sum of \$36,009.16. The defendants, Hately and Bunnell, being only prospective purchasers or tenants, no relief was granted either in their favor or against them.

The premises were directed to be sold by a master in chancery.

PADDOCK, WRIGHT & BILLINGS, attorneys for appellant;
BROWN & PRATT, of counsel.

HAMLIN, HOLLAND & BOYDEN, attorneys for John Moran Packing Company, appellee.

GREEN, ROBBINS & HONORE, attorneys for the Union National Bank, appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Section 20 of chapter 32 of the Revised Statutes, is as follows:

“The by-laws of every corporation shall provide for the calling of meetings of the directors, trustees or other officers corresponding to trustees; and when all such officers shall be present at any meeting, however called or notified, or shall sign a written consent thereto on the record of such meeting, the acts of such meeting shall be as valid as if legally called and notified; provided, that the action of any meeting held beyond the limits of this State shall be void, unless such meeting was authorized or its acts ratified by a vote of two-thirds of the directors, trustees or officers corresponding to trustees, at a regular meeting.”

It is urged by appellants that the foregoing statute was enacted for the protection of stockholders exclusively, and is a matter in which the creditors of corporations and the public generally have no interest, and therefore that appellees, as creditors of the John Moran Packing Company, can not be heard to say that the meeting of the board of directors of said company, held outside of the State, was void or irregular.

In determining whether the mortgage sought to be foreclosed in this case is valid and binding, not only as regards the company, but with reference to appellees and all the creditors of said Packing company, it is well to consider separately and in chronological order the proceedings by virtue of which complainant's mortgage has validity, if at all.

The statute under consideration plainly and explicitly pronounces the action of the directors of the Packing company at the meeting held outside the limits of the State of Illinois, at St. Joseph, Missouri, on the 18th day of February, 1895, void, unless such meeting was authorized or its acts ratified by a vote of two-thirds of the directors, trustees or officers corresponding to trustees, at a regular meeting. It is not claimed that such meeting had previously been authorized. The action taken thereat was therefore void, unless it has since been ratified at a regular meeting by a vote of two-thirds of the directors.

It is unnecessary now to discuss whether such action was void as regards the public or the creditors of said company, as it unquestionably was void so far as the company itself was concerned. There can be no doubt that had the directors of the company returned to Chicago on the day following the action had in Missouri, and in the State of Illinois held a regular meeting properly called, that the company, no ratification of the St. Joseph action having been previously made, might have proceeded to rescind and revoke the action of the 18th of February, and to make conveyances in repudiation and annulment of the same, save that perhaps the company might have been bound to restore whatever benefit it had received from the St. Joseph action.

It is beyond question that the mere action of the board of directors in St. Joseph, Mo., was, as regards the packing company, entirely void. If, therefore, the complainant's mortgage has any validity, it is by virtue of something that has taken place subsequent to the St. Joseph meeting.

In obedience to the instructions given at the St. Joseph meeting to the president and secretary, they immediately proceeded to execute to the complainant the mortgage which it is sought in this proceeding to foreclose. It is urged that such action upon their part was within their powers and binding upon the company.

There is some contrariety of opinion as to what the powers of the president of such a company are. Thompson's Commentaries on the Law of Corporations, Secs. 4618-4619; Morawetz on Private Corporations, Secs. 537-539.

In this State it has long been the rule that the president of a corporation is presumed to have authority to transact for the corporation business of an ordinary nature, arising in the routine of affairs, such as custom or necessity has imposed upon the office. *Chicago, Burlington & Quincy Ry. Co. v. Coleman*, 18 Ill. 297; *Smith v. Smith*, 62 Ill. 493; *Mitchell v. Deeds*, 49 Ill. 416.

The instructions given at the St. Joseph meeting were in effect to convey by way of mortgage, substantially all its property, which consisted of a packing house plant in Missouri, and real property in the State of Illinois, amounting in value to many thousand dollars.

We are of the opinion that the president and secretary of such a company as was this, have not, by mere virtue of their offices, authority to transfer substantially all the property of the corporation to certain creditors by way of preference to them, and that the company was not bound by and might avoid such conveyances.

The transaction was not one within the ordinary or usual course of the business of the company; neither was it such as custom has sanctioned, or the ordinary carrying on of business made necessary. *Winsor v. Bank*, 18 Mo. App. 665; *Hyde v. Larkin*, 35 Mo. App. 366; *McKeag v. Collins*, 87

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Mo. 164; Hoyt v. Thompson, 5 N. Y. (1st Selden), 329; Bank v. Asheville Furniture Co., 116 N. C. 827; Coke v. National Association, 35 Ill. App. 465.

Up to the time of the attempted ratification of the acts of the St. Joseph meeting and the conveyances made thereunder, the Packing company was not bound by such transfers. The company not being bound by the mortgage to complainant, its attaching creditor secured whatever rights it had in and to the property so seized.

In this State the rights of attaching and judgment creditors are equal to those of *bona fide* purchasers.

The meeting of the board of directors, held in Chicago, on March 25, 1895, at which an attempt was made to ratify the action of the St. Joseph meeting and the conveyances thereunder made, could not divest the Union National Bank of the lien which it had theretofore secured by virtue of its attachment. But there is another objection to such attempted ratification. The statute provides that the acts of a meeting held outside of the limits of this State may be ratified by a vote of two-thirds of the directors at a regular meeting. The meeting at which the attempt at ratification was made, seems to have been regularly called and held, but there was not thereat, in support of such attempt, a vote of two-thirds of the directors. Four out of the five directors were present; three voted for and one against the attempted ratification. So far, therefore, as the action of the St. Joseph meeting, instructing the president and secretary to make the deeds under consideration is concerned, such action was not ratified in accordance with the statute.

As to whether the action of the meeting of March 25th was not a ratification of the act of the president and secretary in making the deeds, is, so far as the rights of the Union National Bank are concerned, immaterial, because its rights were secured long before March 25th.

Undoubtedly, the act of the president and secretary of a company, in executing deeds of its property, may be ratified by mere acquiescence therein for a sufficient length of time, but as the attachment of the Union National Bank

was not made after, but on the same day that the mortgage to complainant was recorded, there was no acquiescence by mere inaction.

A distinction has sometimes been drawn between statutes said to have been enacted for the benefit and protection of stockholders only, and those which are enacted as a matter of public policy. This is commented upon in *Beecher v. Marquette Rolling Mill Co.*, 45 Mich. 103.

If, under the circumstances of this case, such distinction was to be considered, it would seem that the statute before mentioned was created for public purposes, and as a declaration of the policy of this State in respect to corporations. It is manifest that it could make but little difference to stockholders whether a meeting of its directors was held within the limits of this State, or just beyond its border; while public policy might dictate that no action had at any meeting held outside of the limits of this State should be binding unless authorized or ratified by a meeting held within reach of the judicial process of this State.

The John Moran Company can not be said to have been; at the time the attachment of the Union National Bank was made, the recipient of such benefits under the mortgage sought to be foreclosed, that it was then estopped to deny the validity of the same. The mortgage was given, not for anything by the Packing company then received, or any detriment suffered by the complainant; the consideration was a debt that had long existed, and the mortgage was consequent upon the demand of appellant that such debt should be paid or secured.

We have no question of the right of an Illinois corporation to prefer *bona fide* creditors, but when a creditor comes into court, claiming a preference, the burden is upon him to establish the validity of the acts under which such claim is made; which principle appellant insists upon in the present case, by urging that owing to the action of the Packing company in withdrawing the plea it had filed to test the merits of the attachment proceeding, and thus consented to a default, and judgment against it upon the attachment issue,

there was such irregularity that it, appellant, is not in this proceeding entitled to contest the truth of the attachment affidavit. As the attachment was upon property which appellant claimed only to have a valid mortgage upon, we are not prepared to hold that it was ever entitled to contest in the attachment proceeding, the truth of the matters set up in the attachment affidavit.

The Supreme Court in the case of *Juillard & Co. v. May*, 130 Ill. 87, said :

“The statute giving the remedy by interpleader, is applicable alike to lands and personal property. The issue, and only issue, there can be upon the interpleader, is upon the affirmative claim of property therein, and when that is decided in favor of the claimant, the court has ample power to see that its own process is not abused by making it the means of selling his property to pay the indebtedness of another for which he is not legally liable. It is fundamental that no person shall be deprived of property without due process of law, and the court can protect the claimant in the rights of property guaranteed him, without assuming to vacate or change the judgment rendered at a prior term against the defendant in attachment.”

As appellant knew of, and could have intervened in, the attachment proceeding, it would seem that if at any time entitled to be heard as to the truth of the alleged grounds for attachment, it should, prior to judgment, have made its contest in the court in which that issue was presented.

The Moran Packing Company was not bound to contest the truth of the affidavit setting forth statutory grounds for an attachment. On the contrary, it might, before or after the issue of the writ, have voluntarily mortgaged the attachment property to the Union National Bank as security for its claim.

Nor do we think that the lien of the Union National Bank was lost by the withdrawal by the Packing company of its plea and the entry of judgment against it by default.

There was no unreasonable departure from the law, if any, by the attaching creditor. *Waples on Attachment*, Sec. 811 (Second Ed.).

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As to the attachment by the Atlas National Bank, made April 26, 1895, a month previous thereto, the Packing company, by its president and secretary, in accordance with directions given by the directors of said company, at a meeting held in the city of Chicago on March 25, 1895, had executed another mortgage to appellant, securing the indebtedness to it, which mortgage was on the same day recorded, and which the bill filed in this case seeks to foreclose.

Whatever may be the rule in other States, it is in this well established that a corporation, although insolvent, may, by a conveyance of its property, prefer one of its creditors, subject to the same restrictions that apply to individual debtors. *Gottlieb v. Miller*, 47 Ill. App. 588; same case in Supreme Court, 154 Ill. 44; *Blair v. Illinois Steel Company*, 159 Ill. 350.

The decree of the Circuit Court holding that the lien acquired by the Atlas National Bank under its attachment, is superior to the lien acquired by appellant under its mortgage executed March 25, 1895, is reversed.

The decree of the Circuit Court holding that the attachment of the Union National Bank has precedence over each of the mortgages executed to appellant, is affirmed, and the decree of the Circuit Court as to all the parties to said foreclosure proceeding, save the Atlas National Bank, is affirmed.

The costs of this court in this case will be taxed, one-half of the same against appellant, and one-half against the Atlas National Bank.

Reversed as to the Atlas National Bank.

Affirmed as to all other appellees.

Union National Bank of Chicago v. State National Bank
of St. Joseph et al.

68 4 3
108 2 16 5

1. FRAUD—*Not to be Inferred.*—Fraud is not to be inferred from the fact that a debtor gives to one of his creditors a mortgage upon his real estate for the purpose of securing him to the exclusion of other creditors.

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Union Nat. Bank v. State Nat. Bank.

Mortgage Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

GREEN, ROBBINS & HONORE, attorneys for appellant.

PADDOCK, WRIGHT & BILLINGS, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This action, which was a bill to foreclose, was heard in the court below in connection with the foreclosure suit of the State National Bank of St. Joseph against the John Moran Packing Company, the Union National Bank, the Atlas National Bank and others. (P. 25 this volume.) Most of the facts stated in the opinion in that case are applicable to the present case, and we refer to the opinion therein as setting forth many facts appertaining to this.

In the present case it appears that the Union National Bank, on the 14th of December, 1895, began an attachment suit against John Moran, levying upon real property by him owned in the city of Chicago, which real property had been by him mortgaged to the State National Bank of St. Joseph, by an instrument by him and his wife executed in the preceding February.

It is insisted by appellant that said mortgage is invalid because it was made with the intent, participated in by the bank, to defraud, hinder and delay the creditors of him, said John Moran, of whom the Union National Bank was then one.

In the court below appellant showed that after the making of the mortgages in February, 1895, the John Moran Packing Company continued to carry on the packing business until some time in the succeeding August, and that during that time the said National Bank of St. Joseph advanced to the Packing company something like a hundred thousand dollars, taking warehouse receipts for its product, as security therefor.

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Mr. John Moran testified that, prior to the making of the mortgages and conveyances in February, 1895, Mr. Donovan, manager of the Union Stock Yards of St. Joseph, in the interests of said National Bank, told him, Moran, that if he did not give to said bank a mortgage on all of his property he would have to close up. Witness continuing, says: "He said that I would have to give up everything; that it would give these people in Chicago a chance to get my property that was here, if they did not cut them off and secure it for me. That is the understanding that I had, so I gave them the mortgage on my private property as well as the Moran Packing company's property. Mr. Donovan came to me, and he said if I would give a mortgage on all my property and on the Packing company's property, that they would enable us to run, and keep us running, and help me to get out of debt, and by so doing, keep the banks here from jumping on me, and he made a contract with me, after the giving of the mortgage, that he would not put the deeds on record here, but he would hold them off."

Q. Was anything said about putting the property out of the reach of the Chicago creditors? A. Yes, sir. Mr. Donovan was working in the interests of the State National Bank. It was said that if I did not do it that the Chicago banks here would pluck me bare; would not leave me anything, and they would help me out there if I would do it. That was the expression that Mr. Donovan said. I have expressed myself that Mr. Donovan deceived me in regard to my business affairs.

Q. Haven't you expressed yourself as late as the latter part of 1895, that you would do all you could against the banks to defeat them in these suits? A. Yes, I did. I will tell you just what I said. I said that it was nothing but just and right when the State National Bank wanted to hog the whole thing, that I would come up and help the banks here in Chicago to get part of their money. I said that I would see that everybody got justice. That is all I want in the case.

Q. Didn't you represent at that time to the bank that

unless they helped you out, you would have to fail? A. That I would have to fail? Why, I was failed already, pretty near it.

Q. You told them, did you not, that there was a great deal of money in the packing business that year? A. I told them that I thought there would be money.

Q. If they would advance you money, you could get on your feet and pay all your creditors? A. Yes, sir.

Q. The Union National Bank, and the Atlas National Bank and everybody? Yes, sir, I told them I had enough of property, if it was taken care of, to pay everybody. I run for awhile.

Q. They did everything they could to keep you going? A. I suppose they did.

Q. But finally you discovered that you could not make it go? A. Well, no; I could not make any money.

Q. Did you quit? A. Yes, sir; I had to quit; they would not advance me any more money. At the time these mortgages were given, I had a talk with Mr. C. B. France as to how the business was to be conducted afterward. The conversation related to the possible attack of other creditors. Mr. France said it was to keep the other creditors from coming in and seizing on the stuff; Mr. C. B. France, the president of the bank. Mr. Lake, of the Union National Bank, came up there to look after this business, and Mr. C. B. France told him: "I am running this packing business; everything here belongs to me." Mr. Lake can tell you that.

Q. What was said by Mr. France to you as to where the title to that property should be—as to your doing the work? A. Well, he said, by doing that, nobody else could come down on the property, and that it would enable us to keep running right along.

Q. By doing what? A. By having the hogs bought in his name and turned over to C. M. France, as warehouseman, and we could not get nothing out without Mr. France would let us do it, and cancel the warehouse receipt; then we could get a carload or two carloads whenever we wanted to get them out.

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Q. State whether or not Mr. France in any such conversation mentioned the Atlas National Bank or the Union National Bank of Chicago as creditors? A. He mentioned both banks; I mean Mr. France, the president of the bank.

The chancellor before whom this cause was tried, saw and heard the witnesses testify; he had an opportunity for determining as to the real facts of the case which we do not possess.

There is no question as to the indebtedness which the mortgage under consideration was made to secure. Mr. Moran evidently, when the mortgages were made, desired to continue in the packing business, and thought that if he could do so, he would be able to pay all his creditors. In the condition in which he was, it was necessary to his continuance in business that somebody should advance him large sums of money, as the Packing company and Mr. John Moran were then practically insolvent—that is, unable to meet their bills as they matured, if not, as would appear, actually indebted to an amount greater than the value of their assets. It was manifest to all parties that no one would advance money for the continuance of the business without having security therefor. The State National Bank was properly anxious to obtain security for its indebtedness. Instead of commencing in Missouri an action of attachment, and levying upon the plant which this Illinois corporation there had, it secured from the Packing company and Mr. John Moran, mortgages upon the Missouri and the Illinois property which each had; that it did so upon the understanding that with such mortgages it would, from time to time, advance money upon the product of the Packing company, does not show that any of the mortgages were made for the purpose of hindering, delaying or defrauding creditors, either of the Packing company or Mr. John Moran.

So far as the appellee, the State National Bank, is concerned, its mortgage was only for the sum which was then actually due to it by both the Packing company and Mr. John Moran. The evidence does not warrant us in revers-

ing the conclusion of the chancellor that it did not appear that the Packing company made the mortgage under consideration for the purpose of hindering, delaying or defrauding the creditors, or that Mr. John Moran made the mortgage to the knowledge of the State National Bank, for such purpose.

The undisputed facts concerning this transaction are such that fraud is not to be inferred. The burden rested upon appellant to show that such fraud entered into the making of this mortgage as renders it invalid against the creditors of Mr. John Moran.

That there was talk that the Chicago banks would not "jump upon" Mr. Moran if these mortgages were executed, does not establish that the purpose of them was in any way or wise to hinder, delay or defraud creditors of Mr. Moran. That the transaction itself, as shown by the numerous deeds made and executed, did not so impress appellant, is manifest from the fact that ten months elapsed ere it began an attachment against the property of Mr. Moran. It is probably the case that this time had elapsed ere Mr. Moran, not having succeeded as he expected in making money in his continuation of the packing business, and the State National Bank having refused to advance him any more money, came to Chicago and told appellant what he has testified to in this case. The testimony of Mr. Moran does tend to cast suspicion upon the validity of the transaction, but is not sufficient to warrant us in overturning the conclusion of the chancellor, in whose presence the witness testified.

The decree of the Circuit Court is affirmed.

CASES

IN THE

APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—MAY TERM, 1896.

Jacob Goldstein v. Sarah Smiley.

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168	438
68	49
105	636

1. **MARRIED WOMEN—*Recovery for the Sale of Dower and Homestead not Barred by Fraud of the Husband.***—A person in failing circumstances conveyed his land to one of his creditors, who promised the wife of such person to pay her three thousand dollars for her interest in the lands at the time of the execution of the deed, in consideration of which promise she joined with her husband in the deed. *It was held* that she was not barred from recovering the money promised, because, in the execution of the deed by her husband, it was his intention to defraud and hinder certain creditors in the collection of their debts.

2. **VERDICTS—*Upon Conflicting Evidence.***—Where the evidence is conflicting and irreconcilable, the judgment will not be reversed on the ground that the verdict is against the evidence, where evidence on the part of the prevailing party by itself considered is sufficient to support a verdict.

3. **PREFERENCE—*By Debtor in Failing Circumstances.***—That a debtor in failing circumstances may prefer certain of his creditors, is a doctrine well settled in this State.

4. **EXCEPTIONS—*Must be Taken in the Court Below.***—An error in the action of the trial court can not be considered on appeal, where there should have been been an exception, and no exception was taken.

5. **RECOVERY—*Under the Common Counts.***—When a contract has been fully performed by the plaintiff, and there is nothing further for him to do, he may recover under the common counts.

Assumpsit, common counts. Appeal from the Circuit Court of Iroquois County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

C. H. PAYSON and NELLY B. KESSLER, attorneys for appellant.

FREE P. MORRIS and FRANK L. HOOPER, attorneys for appellee; JONES & NEWLIN, of counsel.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was a suit by appellee against appellant to recover on an alleged agreement to pay \$3,000 to appellee in consideration of her joining with her husband in a deed of conveyance to appellant for two hundred acres of farm land situated in Iroquois county.

There was a recovery for \$3,000.

The circumstances under which the deed was executed was as follows:

James Smiley, the husband of appellee, owned the land and resided upon it with his family. On the 13th of December, 1895, being heavily in debt to various parties, and fearing that judgments would be entered against him on judgment notes, he entered into a scheme with Goldstein whereby he should sell to the latter the land for \$13,000 and defeat certain of his creditors in the collection of their debts. In furtherance of a previous understanding, Goldstein, in company with one F. R. Moore, went to the house of Smiley about nine o'clock that night, where the deed was drafted by Moore, signed by Smiley and appellee, and acknowledged before a justice of the peace who was present. It was claimed at the time that appellee had advanced \$3,000 to her husband which had been invested upon the farm and both she and her husband were desirous that that amount should be paid her out of the \$13,000 which Goldstein was to pay for the farm. There is a conflict in the evidence as to whether Goldstein promised to pay appellee the \$3,000 for her interest in the property at the time of the execution of the deed. Appellee testified that Goldstein made such a promise, and she is corroborated by other witnesses who were present. Upon the other hand Goldstein testified that

Goldstein v. Smiley.

the promise was not to pay her the \$3,000 for her interest in the land, but merely as a creditor of Smiley, and that such promise was contingent upon there being no judgment entered which would cloud the title to the land before the deed could be recorded. He is corroborated by Moore.

All parties seemed anxious that the deed should be recorded before the entry of any judgments. So Moore took it to the recorder's office and had it filed at 7:30 A. M. the next morning. In defense, it was urged upon the trial that no such promise as that averred in the declaration, was made, but that such promise as was made was that Goldstein would pay appellee \$3,000 in the event there should be no judgments entered against her husband before the deed should be recorded; that she was barred from a recovery because she had joined in a deed with her husband for the purpose of defrauding one of her husband's creditors; and as an additional defense, that she had already been paid the \$3,000 by one Bartmeer and one German. The same contentions are urged here, and in addition it is claimed the judgment should be reversed because of erroneous instructions given appellee, and because the court refused to give proper instructions offered by appellant.

In the conflict of evidence as to what the promise of Goldstein was at the time of the execution of the deed, it was the peculiar province of the jury to decide. We think they rightly decided, and that the consideration of the promise was a conveyance of all right which appellee had in the land—her inchoate right of dower, her right of homestead and the equitable right asserted by reason of her advancing the \$3,000. It was not a conditional promise. There is no force in the contention that appellee is barred from a recovery because in the execution of the deed and the sale of the property to Goldstein, it was intended by Smiley to defraud McGill and hinder him in the collection of his debt. Smiley had the right to prefer certain of his creditors. That doctrine is so well settled in Illinois as to render the citation of authorities unnecessary.

Even if Smiley had been guilty of fraud none has been

shown as against appellee. The claim that appellee had been paid by Bartmeer and German is not supported by the proof. Complaint is made that the court would not allow appellant to prove that four judgments entered against Smiley before the deed was recorded were upon notes signed by him as surety for Bartmeer and German, and that after the application of \$12,000 of the \$13,000 purchase money for the land to the satisfaction of those judgments under an arrangement with Goldstein, Smiley and the judgment creditors, Bartmeer and German, paid the amount of the judgments to appellee. It is quite clear that before appellant could avail of the fact that Bartmeer and German had paid to appellee the amount of those judgments as a defense to this action, he would have to show that such judgments were made in discharge of his promise. This he did not offer to do, and for the reason that the court properly rejected the proofs.

We see no substantial objection to appellee's fourth and fifth instructions. They contain legal propositions, are properly stated and were applicable to the evidence. It is urged that they were variant to the declaration, however. It may be observed that no objection was made to the evidence upon the ground of a variance, and no objection of that kind could obtain if made here for the first time. If the instructions were applicable to the evidence and the objection that they did not apply to the case made by the declaration was not made below (and it does not appear that it was,) it would seem it could not be urged here for the first time. But there is a stronger reason why that contention of appellant must fail. In addition to the special count the declaration contained the common counts. Upon the contention of appellee as to what the contract was there could be a recovery for money had and received under the common counts alone. She had executed the deed, it had been accepted and placed of record, and all that remained to be done was the payment of the \$3,000. When a contract has been fully performed and nothing remains to be done except to pay the money, a recovery can be had

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under the common counts. *Fowler v. Deakman*, 84 Ill. 130; *Gottschalk v. Smith*, 156 Ill. 377.

No error was committed by the court in refusing instructions.

The judgment is right and should be affirmed.

David Reis v. George W. Ravens et al.

1. **PREFERENCES**—*When Diligence of Creditor Will be Rewarded.*—A creditor who has called to his aid a court of equity and by the exercise of superior diligence has discovered and uncovered property which could not be discovered and seized upon by execution at law, is entitled to a preference over other creditors; but this doctrine does not apply to real estate which was included in a deed of assignment of the debtor, was offered for sale by the assignee without bidders, and subsequently sold for taxes on a bill by a creditor to set aside the tax deed.

Creditor's Bill.—Appeal from the Circuit Court of LaSalle County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

STATEMENT OF THE CASE.

In 1876 George W. Ravens and John F. MacKinlay were partners in the banking, etc., business at Ottawa, Illinois, under the name of Ravens, MacKinlay & Co. On August 1, 1876, they made the assignment to David B. Snow, for the benefit of creditors. They assigned not only the firm property, but also the individual assets of each partner, real and personal, except that by the instrument of assignment, each partner reserved such real and personal property as, by the laws of Illinois, is exempt from execution, etc. The real estate of each partner was described in the deed. Ravens conveyed the five acres occupied by him as a homestead, and the undivided half interest in two lots. The usual schedules were attached, one of them showing the real estate assigned by Ravens was valued at \$3,000. The deed of assignment was not only for the benefit of the creditors

named in the schedule, but also for the benefit of any others who might claim to be creditors, and who might satisfy the assignee of the validity of their claims. The assignee was directed by the deed of assignment to distribute the assets between the firm creditors and individual creditors in the manner provided by law in such case.

The assignment having been made before the passage of our general statute relating to assignments for the benefit of creditors, was purely an assignment at common law.

Snow converted all the assets into money excepting a certain tract of real estate, containing about five acres, and occupied by the said George W. Ravens and family as a homestead, and being worth about \$3,000. The appellant, David Reis, was one of the creditors of said firm of Ravens, MacKinlay & Co., and with the other creditors, received dividends from said Snow as assignee, amounting to about thirty per cent of his claim.

Thomas E. MacKinlay was an individual creditor of John F. MacKinlay, and filed a bill in the Circuit Court of La Salle county, asking that the assignee pay to him the amount of his claim, from the individual property of said John F. MacKinlay before the same should be applied toward the payment of the partnership indebtedness. At the hearing the court entered a decree on January 28, 1896, finding that all the property then remaining in the hands of R. D. B. Snow, assignee of the firm of Ravens, MacKinlay & Co., was the sum of \$855, and directed said assignee to pay over said sum to said Thomas E. MacKinlay.

Appellant, David Reis, at the March term, 1881, of the Circuit Court of La Salle county, Illinois, obtained judgment against George W. Ravens and John F. MacKinlay, partners, etc., as Ravens, MacKinlay & Co., for the sum of \$1,197.31, and costs of suit. Execution was issued and returned unsatisfied, and the judgment was afterward revived. It was unsatisfied, and in force at the time of the commencement of this suit.

The five acre tract was offered for sale, but there were no bidders.

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In June, 1884, it was sold for taxes, and bought by John Stout, at the request of George W. Ravens, who furnished Stout the money, and paid him for the service. John Stout transferred the certificate to Catherine Stout, and she obtained a tax deed, and then conveyed the premises to Henry Gondolf, a brother to Mrs. Geo. W. Ravens, all by direction of Geo. W. Ravens. Afterward, by request of Geo. H. Ravens, a son of Geo. W. Ravens, it was conveyed by Gondolf to Geo. H. Ravens, and still later he conveyed it to his mother, Mrs. Geo. W. Ravens. At the time this bill was filed the property was occupied by Geo. W. Ravens and wife and children. The only change in possession that has occurred since is that, some two and a half years ago, Geo. W. Ravens abandoned his family and left the country, and has not returned.

In 1892, appellant filed his bill alleging that the tax sale, and the conveyance made subsequent thereto, were fraudulent, and asking that they be set aside and declared void, and that the land be sold, and the proceeds applied in satisfaction of his judgment. George W. Ravens was served and defaulted. Snow filed answer. Catherine Ravens filed answer, alleging that she was the owner of the property. The Van Diver Corn Planter Company, another creditor of Ravens, MacKinlay & Co., on the 29th day of January, 1893, in an action of debt, revived a judgment against said Ravens, and was given leave to interplead in said cause. At the hearing a decree was entered, finding that the sale for taxes of the real estate was, as to creditors, fraudulent and null and void, and operated merely as a payment of taxes by George W. Ravens, and directing that the homestead interest of Catherine Ravens be set off and the remainder sold, and the proceeds divided among all the creditors of Ravens, MacKinlay & Co., and the original list of creditors, as recognized by the assignee, should be the list among whom distribution should be made, unless it should be made to appear that some one is improperly omitted, or that some one of them has since been settled with by Ravens or MacKinlay.

BUTTERS, CARR & GLEIM and A. E. WHEELER, attorneys for appellant.

SAMUEL RICHOLSON, attorney for Catherine Ravens, appellee.

D. B. SNOW, assignee of Ravens, MacKinlay & Co., appellee, *pro se*.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

A reversal of the decree is asked in this case because the court did not decree that appellant's judgment be paid before any of the proceeds accruing from the sale of the land should be applied toward the payment of the debts of Ravens, MacKinlay & Co. He claims that he is entitled to a preference over other creditors because of his superior diligence in discovering and uncovering the property of the debtor.

It is a well established doctrine that a creditor who has, by calling to his aid a court of equity, and by the exercise of his superior diligence, discovered and uncovered property which could not be discovered and seized upon by execution at law, is entitled to a preference over other creditors.

But the obstacle which stands in the way of appellant successfully invoking the aid of that doctrine is that he has discovered nothing. The five acre tract was included in the deed of assignment and the homestead exemption claimed. The assignee offered it for sale and made efforts to have creditors bid it in. Appellant was well advised of that fact. There has not been a time when the assignee would not have sold the property had there been an offer for it. It is quite likely there were no bids because it was subject to the homestead exemption. Appellant has discovered no new assets. He has uncovered nothing.

The assignment was in force at the time this bill was filed. It was so recognized by appellant because he asked for an order compelling the assignee to sell the property.

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Years ago he could have notified the assignee to sell. After waiting a number of years he calls upon a court of equity to order the assignee to do a thing which he could have had done by the mere asking of the assignee. That act does not show such superior diligence as would entitle him to a preference.

We see nothing wrong with the decree below. Decree affirmed.

Frank Zumwalt v. Charles Fletcher.

1. **BURDEN OF PROOF—Of Settlement.**—Where a plaintiff claims that a settlement was made, and that the defendant promised to pay the amount found to be due, the burden is upon him to establish the facts alleged, by a preponderance of the evidence.

2. **VERDICTS—Usually Conclusive.**—It is only in clear cases, and when it can be seen that the jury have been influenced by passion or prejudice, or have found against the preponderance of the evidence, that Appellate Courts should interfere with their verdicts.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Iroquois County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

CHARLES W. RAYMOND, attorney for appellant.

MORGAN & OREBAUGH, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant before a justice of the peace to recover a balance of \$75.08, which he claimed to be due him for wages. On the first trial before the justice the jury disagreed; but on the second trial appellee obtained a verdict, and appellant took the case to the Circuit Court, where the cause was again tried by a jury, resulting in a verdict for appellee for \$81.01.

A motion for a new trial being overruled, there was judgment on the verdict and appellant brings the case to this court by appeal.

There is no question that appellee worked for appellant five months, lacking fourteen and one-half days, but appellant insists that this labor was performed under an agreement to work five months for \$100, the money to be paid when the term expired; that the contract was entire, and appellee was bound to serve the full term of five months before he was entitled to payment, and that he quit before the term expired, without any just cause or provocation, and is therefore not entitled to recover for the time he served.

On the contrary, appellee contends that the bargain was he should work five months at \$20 per month if he and appellant should agree, and that appellant said that whenever they could not agree, appellee's time should be up.

The only persons actually present when the bargain was made were the parties themselves, who directly contradict each other as to its terms, appellant testifying that the contract made was as claimed by him and appellee swearing that it was as he contends.

But to sustain his contention and corroborate his testimony, appellant introduced some eight or ten witnesses who testify to admissions made by appellee as to the terms of the contract which it seems to us made a clear preponderance of the evidence in his favor upon that question. We think the weight of the evidence shows that the contract between the parties was for the entire term of five months, at \$100 for the term, to be paid when it expired. It is true that appellee claims he was discharged by appellant, but this the latter denies, and of the persons who were present at the disagreement when appellee quit the employment of appellant, none of them corroborate his testimony in that regard. Nor do we see from the evidence that appellee had any just cause for leaving appellant's employment. Aside from his testimony it does not appear that appellant used any harsh language to him, or said anything which was unreasonable under the circumstances.

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Appellant had the right to require of appellee to bind the oats out of which the trouble arose, and appellee had no right to refuse. There is some evidence in the record which tends to show that appellee was desirous of quitting because at that time, it being just in harvest, he could obtain better wages than he was to receive from appellant. However that may be, we see no justification for his quitting the service of appellant before the end of the term agreed upon.

But it is contended by appellee that after he quit, he and appellant had a settlement in which there was found to be due to appellee \$75.08 and that this amount appellant agreed to pay him. It is insisted, therefore, that appellee has the right to recover on the account stated and the promise made to pay the balance found due, regardless of the terms of the original contract. If this position is sustained by the proofs there can be no doubt as to the correctness of the contention. No doubt the general rule is that to warrant a recovery upon a promise of this character the party alleging the promise takes the burden of proving it by a preponderance of the evidence. In this case, unfortunately the only witnesses testifying as to this alleged promise are appellant and appellee, and as to this matter they directly and squarely contradict each other. On the face of the record there would seem to be no preponderance in favor of appellee, and yet we can not say the jury were not warranted in finding as they did. They saw the witnesses and heard them testify, and they had the right to give credence to the party they thought most worthy of credit.

It is only in clear cases, and when it can be seen the jury have been influenced by passion and prejudice, or have found against the preponderance of the evidence, that appellate courts should interfere with their verdicts. Hence, we hesitate to disturb the finding of the jury in this case. They had better opportunities than we have for ascertaining the truth and judging of the credibility of the witnesses. They may have found for appellee upon the question of a promise to pay on the accounting between the parties, and if so, we can not say they had not the right to do so.

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We do not think there was any error on the part of the court in overruling the motion for a continuance.

Nor do we think there was any serious error on the part of the court in giving or refusing instructions.

The judgment will be affirmed.

First National Bank of Monmouth v. Thomas R. Squires.

1. FORMER DECISIONS—*Approved.*—The views expressed in this case on a former appeal are approved. See 59 Ill. App. 134.

2. PRACTICE—*When Exceptions Should be Taken.*—When no exception to a refusal of the court to allow interest was taken when the damages were assessed and judgment rendered, error on the ground of such refusal is not properly assigned, and will not be considered on appeal.

Assumpsit, on a certificate of deposit. Appeal from the Circuit Court of Warren County; the Hon. HIRAM BIGELOW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

ALMON KIDDER and GRIER & STEWART, attorneys for appellant.

KIRKPATRICK & ALEXANDER, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was commenced by Squires, August 4, 1893, to recover on the following instrument:

"D. Rankin, Pres't. John Stephenson, Vice-Pres't.

B. T. O. Hubbard, Cash.

FIRST NATIONAL BANK OF MONMOUTH. CAPITAL \$75,000.

MONMOUTH ILL., February 15, 1884.

T. R. Squires has this day left \$800 to be loaned for his use at not less than eight per cent interest, payable, not to exceed six months, on return of this memorandum.

B. T. O. HUBBARD, Chr."

Upon the trial the Circuit Court withdrew all the evidence from the jury and directed a verdict for the defend-

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ant. From the judgment of costs rendered against him on that trial, Squires appealed to this court, and a reversal was ordered because of error in directing a verdict for the defendant. See *Squires v. First National Bank of Monmouth*, 59 Ill. App. 134.

We then held that the instrument sued on, with the accompanying facts proven, amounted to a certificate of deposit of the bank. The reasons for such holding are fully set forth in the opinion then filed, and need not now be repeated.

After being remanded, the cause was again tried in the Circuit Court, resulting in a judgment in favor of Squires for \$800. From that judgment the bank has appealed.

The evidence as presented by the record now before us is not materially different from what it was when the case was here before. The contention that the transaction can not be regarded as one with the bank because *ultra vires*, was fully considered in our former opinion. We re-affirm the views therein expressed.

In the view entertained by us that the written instrument was a bank contract, the five years statute of limitations, interposed as a defense, has no application.

For the reason that the court did not allow interest on the \$800 appellee has assigned cross-errors. The case was tried by the court, and as no exception to the refusal of the court to allow the interest was taken when the damages were assessed and the judgment was rendered, the cross-errors are not properly assigned, and will not be considered by us. *Buckingham v. The People*, for the use, etc., 26 Ill. App. 269. Judgment affirmed.

Smith, Hill & Co. v. Bruner & Strong.

1. **CONTRACTS—*Must be Performed in a Reasonable Time.***—A number of the citizens of a city signed an agreement to pay the owners of a coal shaft, in consideration of their sinking their shaft to what is known as the third vein of coal, fifty dollars for the first ton of coal delivered to

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each of them from such vein. In a suit against one of the signers of the agreement, it was held that the work was to be prosecuted with reasonable diligence and completed within a reasonable time, and that the owners of the shaft had no right to abandon the work and then take it up again at a late date and insist on payment.

Assumpsit, on a subscription. Appeal from the Circuit Court of Livingston County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

B. F. JONES, attorney for appellants.

A. C. NORTON, attorney for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit commenced by appellants against appellees in the Circuit Court of Livingston County, based on the following subscription:

“PONTIAC, ILL., April 14, 1893.

We, the undersigned, citizens of Pontiac, believing it is for the interest of our city to have a better grade of coal than can be had from the present vein, which is now being worked, agree to pay to Smith, Hill & Co., proprietors of the Pontiac Coal Shaft, in consideration of their sinking the present coal shaft to what is known as the third vein coal, fifty dollars for the first ton of coal delivered to us from the third vein coal.

(Signed)

BRUNER & STRONG,
and others.”

This case was tried before a jury and resulted in a verdict for appellees, and judgment rendered against appellant for costs.

From such judgment this appeal is taken.

There is little dispute as to the evidence in the case, which is substantially as follows:

The appellants were the owners of a coal shaft in Pontiac, and had been working only the first vein of coal; and the quality of that coal not being very good, and because they

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could not make any money, and there was a prospect of the shaft being closed, the citizens made up a subscription list in form of the one copied above and raised a considerable amount by the subscription, which was subsequently raised to \$1,200. The subscription list was in the nature of an inducement held out by the citizens to induce the appellants to sink the coal shaft to the third vein, which was about 200 feet below the first vein of coal.

The appellants proceeded to sink the shaft, and sunk it about ninety feet, when they temporarily abandoned the work. On the 10th day of August, 1893, they leased the mine to John T. Henry to the first day of May, 1895, providing that in case the appellants decided to sink the shaft to third vein the lease was to terminate, but the sinking of the shaft was not to be done before May 1, 1894, nor should the work to sink such shaft be begun after July 1, 1894. On the 9th day of March, 1894, by a new agreement in writing between appellants and said Henry, the first lease was modified by providing that during the term of the first lease the appellants should not sink the shaft. This modification of the lease, however, had another provision by which the right to sell the coal shaft was reserved to the appellants, and the lease was to terminate sixty days from the date of the sale and upon notice.

By this lease and the modification, appellants put it out of their power to sink the shaft to the third vein until the 1st day of May, 1895, unless an opportunity should be offered to sell it before that time, which, in substance, was an indefinite postponement of the project.

On the 24th day of May, 1894, the appellants sold and deeded the coal shaft to one Richard Evans, without any provision in the deed requiring Evans to sink the coal shaft any deeper, but on the 21st of May, 1894, appellant took an agreement from Evans in consideration of the sale of the property to deliver to them on or before April 1, 1895, a sufficient quantity of the first coal mined and raised by him in the third vein of the said coal shaft to fill the agreement made by appellants with the citizens of Pontiac by the sub-

scription list recently signed and circulated by said citizens, and the said Evans was to pay to appellants the \$1,250 so subscribed by said citizens which was recited in the agreement to be a part of the consideration to be paid by Evans to appellants for real estate described in three several deeds of said appellants to said land. It appears that along about the 1st day of April, 1895, about two years after the subscription list was signed, Evans succeeded in sinking the coal shaft to the third vein and delivered to the appellants the ton of coal which appellants were to deliver to appellees by the terms of the subscription and which the latter offered to appellees and claimed the amount subscribed in question. The latter refused to receive it or pay the subscription, hence this suit.

It will become necessary for this court to determine the real meaning of the contract contained in the subscription in question.

Was it a license given by the appellees to complete the sinking of the coal shaft any time in the future?

We think not, and especially where the appellants, as in this case, had abandoned the project of sinking the shaft to the third vein for an uncertain and indefinite period, depending upon the event of their finally selling the coal shaft and inducing some one else to sink the shaft.

We think that it was within the contemplation of the subscribers to the subscription list and the appellants that the work was to be prosecuted with reasonable diligence and completed within a reasonable time, and that the appellants, if they intended to get the benefits of the subscription, had no right to abandon the work and then take it up again at so late a date and insist on the payment of the subscription.

Some of the defendants' instructions may have been given on a wrong theory of the case, but under the evidence we think the verdict of the jury was the only one that could have been properly returned, as the subscription list required a diligent prosecution of the work of sinking the coal shaft by appellants without abandonment, and its completion

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within a reasonable time, neither of which we think was done in this case. And under the circumstances the appellants can not be regarded as having expended their money in the completion of the coal shaft on the faith of the subscription, hence there was no consideration moving to the appellees.

The judgment of the court below is therefore affirmed.

Martin Hecke v. Emil Meyer.

1. **DECREES—*Must be Sustained by the Proofs in the Record.***—Where there is no evidence in the record to sustain the finding of the trial court on one of the material allegations of plaintiff's bill a decree in his favor must be reversed on appeal.

2. **SPECIFIC PERFORMANCE—*Certainty of Description.***—A bill for the specific performance of a contract relating to real estate must describe the land with such certainty that it can be identified beyond the possibility of future controversy and a court of equity will decree a specific performance of such a contract only when it is so clear as to have no uncertainty as to quality, shape and location.

BILL, for specific performance. Error to the Circuit Court of Bureau County; the Hon. GEORGE W. STIPP, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded with directions. Opinion filed December 9, 1896.

FRED T. BEERS, attorney for plaintiff in error.

No appearance for defendant in error.

PER CURIAM.

The defendant in error exhibited to the Circuit Court a bill in equity in which he set up that Martin Hecke, plaintiff in error, in November, 1893, agreed to invest \$100 borrowed of defendant in error in a house and lot situated in the village of DePue, Bureau county, Illinois, and execute and deliver to him a mortgage on the same to secure the payment of that sum; that Hecke invested the \$100 so bor-

rowed in a lot in the village mentioned, but refused to execute the mortgage to the defendant in error. The bill prayed for a decree compelling Hecke to execute a mortgage on the lot purchased to secure the loan, or to repay the money with interest, and that a lien on the premises be declared in favor of defendant in error to the extent of his loan.

Hecke was served but did not answer. A default was entered against him and a reference was made to the master to take proofs and report findings of law and fact. The master took the proofs, which consisted of the testimony of Emil Meyer and Edward Meyer only, and reported the facts to be as alleged in the bill and that Emil Meyer was entitled to the relief prayed for. The court approved the report, found that Hecke had promised to secure the repayment of the \$100 by executing a mortgage on lot 87, in the original village of Trenton, (now DePue) to Meyer and decreed that he pay to the master for Meyer \$105.40 by the 23d. of March, 1895, or in case of failure therein to execute and deliver to him a note for that sum with five per cent interest payable March 23, 1896, with mortgage on lot 87, and that in case of failure to perform either the payment required or the delivery of the note and mortgage the premises should be sold, etc.

The decree must be reversed because the evidence in the record is not sufficient to sustain it. Under the proofs it is clear that Hecke borrowed \$100 of Meyer and agreed to secure its repayment by a mortgage on premises he should purchase, but what premises, the proofs nowhere disclose. There is no evidence whatever on which to base a finding that the mortgage was to be placed on lot 87 or that Hecke purchased that lot. The court found that the \$100 borrowed constituted part of the purchase money for lot 87. There was not a scintilla of proof in support of that finding.

We do not hesitate to say that the allegations in the bill are not sufficient to support the decree, although deficiency of the bill is not specifically made one of the assignments of error. The bill nowhere contains any description of

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the premises against which a mortgage is asked. A bill for the specific performance of a contract relating to real estate must describe the land with such certainty that it can be identified beyond the possibility of future controversy. A court of equity will decree a specific performance of such a contract only when the contract is so clear as to have no uncertainty as to quantity, shape and location. 1 Story's Eq. Jur., Sec. 767; Fry on Specific Performance, Sec. 211; Hamilton v. Harvey, 121 Ill. 469.

The most that can be said of the allegations in the bill and the proofs in the record is that they show a right of action at law. The court, instead of granting the relief prayed for, should have dismissed the bill.

The decree is reversed and the cause is remanded with directions to the Circuit Court to dismiss the bill.

Jennie H. Brownell and D. S. Hardin v. Zack Twyman.

1. LANDLORD AND TENANT—*Possession of Property Coupled with Lien.*—If a landlord has possession of hay raised on his land, as well as his statutory lien thereon, he is entitled to hold possession of it, even as against a purchaser for value without notice.

2. SAME—*Notice of Lien to be Shown by Landlord.*—The burden of showing notice of a landlord's lien, to a purchaser, is upon the landlord, and the purchaser is not bound in the first instance to show his good faith.

3. REPLEVIN—*Statements in Affidavit for.*—The mere fact that a plaintiff in his affidavit for replevin, says that the defendant wrongfully detains possession from him, does not operate to unite such possession to a right to a lien and enable the defendant to retain the property against one having a better right.

Replevin.—Appeal from the Circuit Court of Warren County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

GRIER & STEWART, attorneys for appellants.

C. C. SECRIST, attorney for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellee brought replevin against appellants before a justice of the peace to recover the possession of eighty bales of hay valued at \$28, and recovered a judgment. Appellants appealed to the Circuit Court, where the case was tried by a jury with a like result. They now bring the case to this court and seek a reversal, on the ground that the court below erred in the giving and refusing instructions, and in overruling their motion for a new trial.

The hay in controversy was raised upon the farm of appellant Jennie H. Brownell by one A. S. Kyle, who was her tenant, under an agreement to pay a cash rent of \$700 per year. The hay was bailed upon the Brownell farm, but it was then hauled to and stored in the barn of Mrs. Harriet Hardin, the mother of Mrs. Brownell.

Appellants claim that the hay was turned over to Mrs. Brownell by Kyle, to apply on the rent, and was stored in the barn for her use and benefit, and that it was in her possession during all the time it was in the barn. This is denied by appellee, and the principal controversy is upon this point. If Mrs. Brownell had the possession, as well as her landlord's lien, given by the statute, she would undoubtedly be entitled to hold the hay. But the proofs seem to show that Kyle went to appellee's place of business and offered to sell him some baled hay which he claimed to have stored in Mrs. Harriet Hardin's barn. Twyman and Kyle went to the barn, and then Kyle took a key from his pocket, unlocked the barn, and they went in, examined the hay and counted the bales, locked up the barn again and went back to appellee's mill, and there appellee bought the hay, paying Kyle \$28 therefor in cash. Kyle was to haul the hay or pay for the hauling. He did neither, and about two weeks afterward appellee went after the hay, but before he had gotten any of it away, appellants came and drove him off the place, claiming the hay as the property of Mrs. Brownell, and refusing to allow appellee to remove it. This appears to be the first time appellee was informed, or had notice,

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that Mrs. Brownell made any claim to the property, or that the hay was raised upon her farm. He swears that he knew Kyle had been selling and delivering baled hay to others, and on these points his testimony is undisputed. He appears to have been a purchaser of the hay in good faith and without notice that Mrs. Brownell claimed any interest in the property. Having a key to the barn, Kyle appeared to be in possession, and to have the *indicia* of ownership. On the facts appearing in the evidence we are not disposed to interfere with the finding of the jury. The case has been twice tried, and each time appellee has been the successful party. There is a conflict in the evidence as to whether or not Kyle ever turned over the hay to Mrs. Brownell. He swears that he did not. The jury were the judges of the credibility of the witnesses, and it was their duty to reconcile the conflicting evidence if they could. They have found that Mrs. Brownell was not in the possession of the hay, and if she was not, then, in order to enforce her lien, it would be necessary to resort to a distress warrant for that purpose.

The hay was removed from her premises, apparently with her knowledge and consent, and without proof that appellee had notice of her lien. Kyle, being apparently in possession, appellee would obtain a good title to the property in good faith from Kyle, and Mrs. Brownell must be held to have lost her right to a lien. We think the burden of showing notice of the landlord's lien, to a purchaser, is upon the landlord, and the purchaser is not bound, in the first instance, to show his good faith.

Much stress is laid upon the fact that in his affidavit for a writ of replevin, appellee acknowledges that Mrs. Brownell had the possession of the hay, and the case of *Hunter et al. v. Whitfield*, 89 Ill. 229, is cited in support of the contention that this is an admission that the possession was in her. An examination of that case shows that it has no similarity to the one now under consideration, and what was said upon this point in that case can have no controlling force in this. There the landlord was clearly in the possession of the prop-

erty in dispute, the tenant having voluntarily abandoned the farm, and the landlord having taken possession of the crops. Here appellee purchased the hay from the tenant, apparently in possession, and was himself actually in possession for the purpose of removing the property when driven off by the appellants. We think the mere fact that in his affidavit he says that appellants wrongfully detain the possession from him ought not, of itself alone, and without other proof of her rightful possession, be held to show possession in her, so as to unite such possession to her right to a lien, and enable her to retain such possession as against one having a better right.

Under the views above expressed we find no error on the part of the court in giving or refusing instructions, and the judgment will be affirmed.

**Mary Jones and Nancy Garner v. Jeremiah Dawson,
Administrator, etc.**

1. **ADVANCEMENTS—How Proved.**—In order to create a valid advancement, the gift or grant must be expressed or charged in writing as an advancement by the intestate or acknowledged in writing as an advancement by the child or other descendant. Mere memoranda of what he had given his children, made by a person since deceased, which do not contain anything to show that they were more than mere charges, or anything expressing the intention of the deceased that the gifts were made as advancements or charged as such, are not proofs that such gifts were made as advancements.

Order of Distribution, of money in hands of an administration.
Appeal from the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

KAY & KAY, attorneys for appellants.

CHARLES W. RAYMOND, attorney for appellee.

JONES v. Dawson.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a case appealed from the Circuit Court of Iroquois County from an order of the court overruling exceptions to the appellee's final report as administrator of his father's estate, and an order of the court ordering distribution according to the recommendations of the report.

The report showed a balance due to the several heirs of the deceased in the aggregate of \$3,253.24.

The appellants were two of the heirs of Elisha Dawson, deceased, and excepted to the report, alleging that Elisha Dawson in his lifetime had made advances to his several children and grandchildren as follows:

To Sally Holloway, a daughter, now dead, and her descendants.....	\$406.00
To Jeremiah Dawson, a son.....	847.00
To Mary M. Jones (<i>nee</i> Dawson), a daughter (appellant).....	190.00
To Lucretia Tompkins, a daughter, now dead.....	67.00
To her daughter, Mary Crist.....	247.00

	314.00
To William M. Dawson, a son.....	897.00
To Thomas Dawson, a son.....	947.00
To Hillias Dawson, a son.....	847.00
To Nancy Garner, a daughter (appellant).....	247.00
To Irvin P. Dawson, a son.....	847.00

And contended that by virtue of the said advancements, the heirs of the deceased were not on an equal footing in the distribution of the estate as provided for in the fourth, fifth, sixth, seventh, and eighth sections of chapter 39 of the Revised Statutes, and asked the court to make such order as would make the parties equal in the distribution of the estate.

The judge of the County Court having been of counsel for some of the parties, the cause had been transferred by agreement to the Circuit Court, and the present counsel for appellees having been elected judge of the County Court,

the estate now remains in the Circuit Court for settlement. The Circuit Court heard the evidence and decided, under the statute as it then existed, that there was no advancement, approved the administrator's report and ordered distribution as prayed for therein.

From such order this appeal was taken to this court.

The evidence of advancement consisted almost entirely of an old account book of the deceased, claimed to have been kept by him, and in which, it is claimed by appellants, he caused to be entered the several supposed advancements.

The entire question to be decided in this case is, as to whether the proof sustains the appellant's claim of any of the supposed advancements, otherwise the administrator's report and recommendation of distribution and the order of the court approving it are conceded to be correct.

Sec. 7, Chap. 39, R. S., provides that "no gift or grant shall be deemed to have been made in advancement unless so expressed in writing or charged in writing by the intestate as an advancement, or acknowledged by the child or other descendants.

This statute applies to advancements made prior to its enactment in cases of subsequent distribution as well as to cases arising since its enactment. *Simpson v. Simpson*, 114 Ill. 603.

So that this case will be governed by the provisions of that statute. And under this statute an advancement can not be created by parol declaration or statements. But, on the other hand, in order to create a valid advancement, the gift or grant must be expressed in writing as an advancement, or charged in writing by the intestate as an advancement, or acknowledged in writing by the child or other descendant. *Wilkinson et al. v. Thomas et al.*, 128 Ill. 363. It is held in *Comer v. Comer*, 119 Ill. 180, that it is not every gift that a parent may make the child that is to be considered an advancement. It should appear in some way that it was intended as an advancement before the child's part shall be charged with it. See, also, for authority in point, *Wallace et al. v. Reddick et al.*, 119 Ill. 151.

 JONES v. DAWSON.

It appears from the evidence that Elisha Dawson could neither read writing nor write anything beyond his own name and was eighty-one years old when he died.

There appears on the second page of the sixth leaf of the account book of the deceased, this entry :
 "1868.

Dec. 6. I have debited each with their shares of dowry on the preceding pages."

This entry was not put there by the deceased nor to his knowledge nor with his consent.

It was put there by his son Hillias, who says he put it there "of my own free good will to avoid trouble."

He did not know that he showed it to his father or read it to him. He put it down for the purpose of showing what he thought his father was aiming to do himself.

All the other charges in the book were mere charges of so much money or land, or perhaps not even charges, with no statement for what purpose.

The following is a sample of all :

" 22

1868. Hillias Dawson.

Dec. 6. One horse.....	\$ 80.00
" cow.....	
and other stock.....	.67
Real estate.....	700.00."

It was a mere memorandum of what he had given his children in real estate and in personal property. The deeds were introduced in evidence and none of them showed any intended advancement but rather a gift or sale.

None of the writings were made in the handwriting of the deceased, and the day book, so-called, had been written in by different members of the family, especially his son Hillias, and granddaughter, Mary Crist.

We can not find from the entries that any of the entries in the deceased's day book, which have been shown to have been authorized by deceased, were anything more than mere charges, and nothing in them expressing the intention of the deceased that the gifts were made as advancements or

charged as such. The Circuit Court appears to have held correctly that there were no advancements.

Seeing no error in the record, the order of the court below, from which this appeal is taken, is affirmed.

68	74
87	497

Eber Cartwright, Ex'r, etc., v. Henry G. Cartwright and Elizabeth Cartwright.

1. **LIMITATIONS**—*Who May Plead the Statute.*—The statute of limitations grants a personal privilege and can not be pleaded by another than the debtor, except he stand in privity.

2. **MARRIED WOMEN**—*Have the Right to Contract with their Husbands.*—Under the laws of this State married women have a right to contract with their husbands, and the wife has a right to receive payment of her debt the same as a *feme sole*.

3. **HUSBAND AND WIFE**—*Preferences by Husband.*—A debtor has a right to pay any creditor in full to the exclusion of other debts, even if such creditor is his wife.

Creditor's Bill.—Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

SNOW & HINEBAUGH, attorneys for appellant.

TRAINOR, BROWNE & AYERS, attorneys for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a bill in equity, filed in the Circuit Court of La Salle county, Illinois, by the appellant herein, administrator of the estate of Almerin Cartwright, deceased, against the appellees, Elizabeth Cartwright and Henry G. Cartwright, her husband.

The bill was a creditor's bill, and sought to subject certain real estate, held in her name, to the satisfaction of a certain judgment, obtained by the appellant in the County Court of said county, against Henry G. Cartwright, one of the appellees.

Cartwright v. Cartwright.

The cause was tried by the court upon bill and answer, and, upon hearing, a decree was rendered by the court and the bill dismissed.

From that decree this appeal is taken.

The bill alleges fraud and an intention on the part of appellees to hinder and delay the creditors of Henry G. Cartwright (one of the appellees), of which the appellant was one, and held a judgment against the latter on a cause of action accruing prior to the conveyance.

Substantially, the only evidence introduced was that of the two appellees, who show that the deed from Henry G. Cartwright to his wife, Elizabeth, was made in consideration of a *bona fide* indebtedness due from him to his wife, and there is no evidence contradicting it. The appellee Elizabeth testified she loaned him, her husband, twenty-five hundred dollars; that she got eleven hundred dollars from her uncle, and eleven hundred dollars from her brother, and the rest she worked for and earned; that she was married in 1850; that the money was given to her when she was sixteen or seventeen years old; that she was not quite twenty when she was married; that she put the money at interest; that the land in question was bought in his name; that she thought he would pay her back the money, and was not uneasy about it; that she first suggested that he deed the land to her, in 1890; that he paid her no interest until he deeded her the eighty-acre tract of land; that she told her husband to deed her the eighty acres of land in question, and she would be "square" with him. He said he would, and did, and that she kept the note until she handed it over to him, and that was the last she knew of it; that the land was purchased with the money loaned to him, and that she took his note at the time she loaned the money, and kept it.

Henry G. Cartwright testified that after he borrowed the money from his wife she often spoke to him about an adjustment, sometimes once or twice a year she wanted her pay, and that he said that he had nothing to pay with; that he would pay as soon as he could. That the sum of it was that he could not pay it.

It is claimed that the statute of limitations had run against appellee Elizabeth's note, but this is a personal privilege and can not be pleaded by another than the debtor, except he stands in privity. *Emery v. Keighan*, 94 Ill. 543; *Lee v. Mound Station*, 118 Ill. 312; *Shields v. Schiff*, 124 U. S. 351.

We see no badges of fraud in the cases and nothing to contradict the appellee's testimony that the claim was a *bona fide* one and always intended to be kept alive.

The money was never intended to be given to the husband, otherwise the note would never have been taken.

After the loan Mrs. Cartwright kept demanding payment, and her husband kept promising to pay up until 1890, when the deed was made which was the full satisfaction of the claim.

This ratification made the claim good, even if the acts of 1861, 1869 and 1874 had not done so. *Thomas v. Mueller et al.*, 106 Ill. 41.

Under the laws of this State, married women have a right to contract with their husbands, and the wife has a right to receive payment of her debt the same as a *feme sole*, and a creditor has a right to pay any debtor in full to the exclusion of other claims, even if such creditor is his wife.

We see no error in the record, and the decree of the court below is affirmed.

Chicago & Alton R. R. Co. v. Morgan L. Truitt.

1. EVIDENCE—*Opinions by Persons not Experts.*—A witness who knows the condition of a gate and its fastenings, and the surrounding conditions, may state his opinion as to the effect the wind would have upon it, and it is not necessary that he should be an expert.

2. CONTRIBUTORY NEGLIGENCE—*A Question of Fact.*—Whether there was contributory negligence in a particular case is a question of fact, and when a jury are asked to decide whether a plaintiff was guilty of contributory negligence they should be allowed to consider all the circumstances of the case.

C. & A. R. R. Co. v. Truitt.

8. **ATTORNEY'S FEES**—*Common Law and Statutory Negligence.*—In a suit against a railroad company the declaration contained four counts, one of which charged negligence in running a train, the others negligence in not maintaining a proper fence. *Held*, that attorney's fees could only be recovered if the injury complained of was caused by statutory negligence in not maintaining a proper fence, and that a general verdict based on such a declaration would not support their allowance.

Trespass on the Case, for killing stock. Appeal from the Circuit Court of Marshall County; the Hon. NATHANIEL W. GREEN, Judge, presiding. Heard in this court at the May term, 1896. Remittitur allowed, judgment affirmed and costs of appeal assessed against appellee to date of remittitur. Opinion filed December 9, 1896.

R. M. BARNES, attorney for appellant.

E. D. RICHMOND, attorney for appellee.

MR JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an action on the case by appellee against the appellant, to recover the value of two horses belonging to the former, charged to have been killed by the latter's engine and train, while running on its railroad track through the premises of the appellee.

The declaration consists of four counts. The first three charge the appellant with statutory negligence in not erecting and maintaining fences on both sides of its railroad track suitable and sufficient to prevent horses from getting thereon, and in not maintaining gates and bars at farm crossings of said railroad where the same were necessary and suitable, sufficient to prevent horses from getting on said railroad track, by means whereof, and for the want of such gate, two horses of the appellee strayed and went upon the railroad at the place where the gates and bars were necessary, etc., whereby appellant's engine ran into and struck the horses and killed them. The fourth count charged common law negligence in that, while appellee's horses had strayed upon appellant's railroad track, the engine driver of appellant carelessly ran upon said horses, and struck and killed them.

The accident took place October 27, 1895. The case was tried by a jury and resulted in a verdict for appellee for \$160, upon which judgment was rendered for appellee. Thirty-five dollars of the said verdict was made up of attorney's fees, allowable under the statute when, by reason of the failure of a railroad to fence its track, stock is killed or injured in consequence.

The evidence tended to show that appellant maintained a gate at a farm crossing on its railroad right of way, running through appellee's farm, about fifteen rods from his house; that appellee's barn lot or pasture went down to the gate which leads over the farm crossing; that his horses run in this lot adjoining, and on the morning they were killed they went through the open gate next to the pasture and got on the railroad track, and were run over and killed.

The evidence tended to show that the gate was closed on the evening before the killing, and that in some manner it got open during the night time, thus enabling the horses to get through it.

It is insisted on the part of appellant's counsel that the verdict was manifestly against the weight of the evidence, in that it failed to show that the gate fastening was insufficient and out of repair.

We are inclined to think, however, that the evidence was sufficient.

It tended to show that the gate, which was about twelve feet long and consisted of four boards, braced by boards being nailed on diagonally from one corner to the other, and hung on hinges, had sagged at the end where it was fastened, and that it was fastened by a hook on the east end of the gate, the hinges being on the west end, and that the staple in the gate post was about four inches higher than the fastening hook, and in order to fasten the gate it had to be raised up three or four inches, in order to place the hook into the staple, and that it rested that way on the hook, liable to be blown open by the wind, which blew from the south against the side of the gate quite stiffly that

night; that the railroad men worked along there and were there frequently and saw the condition of the gate, and that it had been in that condition some time, and the evidence also tended to show appellee also knew of the condition of the gate.

The appellant objected to the following testimony, given in by appellee by his witness, Thos. E. Hogue, to wit: "The wind that night (the night before the accident) was very strong. It came up in the night, and the way that gate was I knew it would blow it very easily open."

This was objected to because it was "asking the witness to pass judgment on what the plaintiff claimed to be the facts of the case."

We do not think that the evidence is subject to the objection urged against it.

The witness, from his knowledge of the gate fastening, and the gate and the surrounding conditions, was able to judge, and state his opinion, the effect the wind would have upon it, and it was not necessary that he should be an expert witness.

Any person of ordinary experience would be able to form an opinion on such a subject, and it is a class of evidence that is always allowed by the court.

The witness did not state his conclusion that the wind did blow the gate open, only that it was capable of doing so. The answer of the witness did not cover the question to be found by the jury. The question to be found by the jury was whether the wind did blow the gate open, a question which the witness would not have been capable of deciding. It is objected that the court refused to give the appellant's third and fourth refused instructions.

These instructions were properly refused. They attempted to state as a matter of law that if certain facts existed, and appellee was aware of the condition of the gate, and turned his stock into the lot as he did, then he could not recover, being guilty of contributory negligence.

It was a question of fact for the jury under the circumstances to say whether or not the appellee was guilty of

contributory negligence. It was not a question of law for the court to decide. If it was proper to submit the question of contributory negligence of appellee to the jury it should have been left to the jury to find under all the circumstances whether appellee was guilty of contributory negligence in turning his stock into the lot as he did.

It is also insisted that the court erred in instructing the jury that if it found the issues for the plaintiff that the jury should assess attorney's fees as a part of the damages for conducting this case to a final conclusion in the Circuit Court.

This was undoubtedly error under the issues in the case. Attorney's fees are only allowed in cases where a railroad company fails to perform its duty in fencing its railroad track and not where there is a common law cause of action on account of negligence.

One of the issues in this case was as to whether the appellant was guilty of negligence in running over the horses with its engine, irrespective of the question of fencing. *C. M. & St. P. R. R. Co. v. Phillips*, 14 Ill. App. 265.

But as the appellee under the requirement of this court has entered a remittitur of \$35, the amount of the attorney's fee included in the verdict and judgment, the error in giving the instruction in question is corrected.

There appears to be no other error in this record.

The remittitur is allowed by this court, and the judgment of the court below to the amount of \$125 is affirmed, and the costs of the appeal are assessed against appellee, up to and including the cost of the remittitur.

John Arnburg v. The People of the State of Illinois.

1. VERDICTS—*In Criminal Cases—Power of the Court Over.*—A court may set aside a defective verdict, on which no judgment can be rendered, and award a *venire facias de novo* in a criminal case.

Indictment, for assault with a deadly weapon. Error to the County Court of Rock Island County; the Hon. LUCIAN ADAMS, Judge, presid-

Arnburg v. The People.

ing. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

HAROLD A. WELD, attorney for plaintiff in error.

C. J. SEARLE, State's Attorney of Rock Island county, for defendant in error.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was indicted for an assault with a deadly weapon, with an intent to inflict upon the person of another a bodily injury.

There were two counts in the indictment, the first alleging that no considerable provocation for the assault appeared, and the second charging that all the circumstances of the assault showed an abandoned and malignant heart, thus bringing the case within the provisions of the 25th section of the Criminal Code. 1 Starr & Curtis, 761.

The defendant below was arraigned, and, standing mute, the court ordered a plea of not guilty to be entered, and upon a trial the jury disagreed and were discharged. On March 21, 1896, the plaintiff in error was again put upon trial, and the jury brought in a verdict of guilty of assault and battery. The verdict was accepted by the court and the jury discharged. On April 17, 1896, the trial court, on its own motion, set the verdict aside and ordered a new trial, over the objection of plaintiff in error.

A special venire was ordered and trial had, resulting in a verdict finding plaintiff in error guilty of an assault, whereupon the court entered judgment for a fine of \$50 and costs. Plaintiff in error objected to every step of the proceedings subsequent to the verdict of March 21, 1896, and when that verdict was set aside by the court he entered a motion for his discharge, upon the ground that the verdict, not being responsive to the issues, was a nullity, and amounted to an acquittal of the defendant on trial. The motion was overruled with the results above stated. The proper exceptions

are preserved so as to present to this court the questions involved, viz.:

1. The court erred in overruling the motion for discharge.

2. In overruling the objection to the special venire for a third trial.

3. In putting plaintiff in error on trial again after the verdict of March 21, and

4. In rendering judgment.

It is conceded that the indictment would not support a verdict of guilty of an "assault and battery," and therefore it was not responsive to the issue. *Young v. The People*, 6 Ill. App. 434; *Moore v. The People*, 26 Ill. App. 137.

The question presented to us, then, is, had the trial court the right, after receiving the irresponsive verdict and discharging the jury, to set the verdict aside on its own motion and compel the defendant to submit to another trial? Plaintiff in error relies on *Logg v. The People*, 8 Ill. App. 99, for a reversal, and the reasoning of the opinion would, to some extent, seem to support his contention, but the facts of that case were essentially different from those in the one now before us. There can be no doubt of the correctness of the decision in that case, but is it decisive of this? Without discussing the cases at length, we think not. Here there was an attempt to find the defendant guilty of an offense analogous to one which was charged in the indictment, viz., an assault; but the jury went further, and found the defendant guilty of a battery coupled with the assault, which was not warranted by the indictment. The court could render no judgment on the verdict. In the case of *Lawrence et al. v. The People*, 1 Scam. 414, the defendants were indicted for larceny, and upon the trial, a defective verdict was returned, upon which it was conceded no judgment could be rendered. In deciding the case, the court say: "The only question presented in this case is on the power of the Circuit Court to set aside a defective verdict on which no judgment could be rendered, and to award a *venire de novo*. The right to exercise this power can not

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be questioned. It has been exercised and practiced on in numerous criminal cases, and is undoubted. If the verdict does not sufficiently ascertain the facts of the case, the court may award a *venire facias de novo*; also, where the facts are found so defectively that no judgment can be given." And the judgment of conviction was affirmed. See also *The State v. Redman*, 17 Iowa, 329, in which case it is held that such second trial does not put the defendant twice in jeopardy for the same offense. This Iowa case is a well considered one, and cites many authorities in support of the decision. In the trial of March 21, 1896, in this case, there was simply a mistrial, rather than a putting in legal jeopardy, and we think the court did not err in setting the verdict aside, and ordering a *venire facias de novo*. The judgment will be affirmed.

Charles Marske v. Luther C. Willard.

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189	276

1. PLEADING—*Waiver of Demurrer*.—A defendant waives his demurrer by pleading to the merits of the declaration.

2. DESCRIPTION—*In Real Estate Contracts—Admissibility of Extrinsic Evidence*.—A deed or other written contract in relation to real estate is not void for uncertainty in the description, if from the words employed, the description can be made certain by extrinsic evidence of facts; and proof that the vendor put the purchaser in possession of the premises intended to be conveyed, is sufficient.

3. CONTRACTS—*Construction of*.—A contract relating to real estate provided that if A should desire to sell the property, he should give to B the first opportunity to purchase the same, provided he would pay as much as any other person. In a suit by B for a breach of the contract, it was held, that in case A desired to sell the property and was willing to accept an offer, then B had an option to purchase at the price offered, regardless of what A might have received had he made the effort, and that the person offering to purchase must offer cash or its equivalent.

4. BILL OF EXCEPTIONS—*Presumptions Arising from Defects in*.—In the absence of a bill of exceptions showing that it contains all the evidence, the presumption is that the verdict is sustained by the proof, and the fact that a bill of exceptions contains all the evidence must be shown by the certificate of the judge, a statement by the reporter not being sufficient.

5. *OPTIONS—Mutuality of, Not Necessary.*—When an option to purchase the property involved is granted to one of the parties to a lease, or other contract, for which the option forms one of the considerations, the want of mutuality of such option will not avoid the contract.

Action, for breach of real estate contract. Appeal from the Circuit Court of Boone County; the Hon. CHARLES KELLUM, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

ROBERT W. WRIGHT, attorney for appellant.

CHARLES E. FULLER and WILLIAM C. DEWOLF, attorneys for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This suit was in covenant commenced by appellee to recover on the covenants in a lease given by appellant to him in which there were certain provisions for a sale of the leased premises to appellee claimed in the declaration to have been violated. By agreement the declaration was changed from an action of covenant to assumpsit.

The appellant first demurred to the declaration, which being overruled, he pleaded two pleas: the general issue, and the statute of frauds, claiming the contract was not in writing. The appellee joined issue on the pleas and the cause went to trial before a jury, resulting in a verdict against appellant for \$1,000, upon which judgment was duly rendered.

From this judgment this appeal is taken.

The argument of counsel for appellant, in his first point raised, to the effect that the court erred in overruling the demurrer to the declaration, can not be considered by this court, for the reason that the demurrer was waived by appellant, by his pleading over to the declaration.

According to the well known rules of pleading a defendant waives his demurrer by pleading to the merits of the declaration.

In appellant's second point it is insisted that the description of the lot in question in the lease was not sufficient to describe the property, and that parol evidence to clear up

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any latent ambiguity was inadmissible. It is insisted the ambiguity was patent and not latent, and hence parol evidence was not admissible to aid the description in the lease to identify the lot.

The description of the leased premises contained in the lease is as follows :

“Lot number —— in Assessor’s Subdivision of Whitney’s Block No. 8, in town (now city) of Belvidere, in Boone county, Illinois.” * * *

And the covenants in the lease upon which the suit was based is as follows :

“And it is further agreed, that this lease may be continued from year to year under the same terms, at the option of the said party of the second part, for a period not to exceed five years.

And should said party of the second part desire to surrender possession after the first year, he may do so by giving to said Marske at least sixty days previous notice of his intention so to do; and, should said Marske desire to sell said premises, he may do so by giving to said Willard sixty days previous notice, and by first giving to said Willard the first opportunity to purchase said premises, provided he will pay as much as any other person.”

The appellant put appellee into possession of the lot intended to be leased, and the latter held such possession until after the sale in question. It will be seen that the block and subdivision in which the lot was situated was fully described, though it was left uncertain what particular lot was meant; but the intention of the parties was freely manifested by their conduct in delivering and taking possession of the lot intended. It is laid down in *Hays v. O’Brien*, 149 Ill. 403, that “a deed or other written contract is not void for uncertainty in the description of the land sold and conveyed, if from the words employed the description can be made certain by extrinsic evidence of facts, physical conditions, measurements, or monuments referred to in the deed.” * * * “And thus a defective description of land may be aided by the conduct of the parties, such as, that the vendor put the

purchaser in the possession of the premises intended to be conveyed.”

That was done in this case, and the identification of the land was rendered thereby complete.

The question raised in this case, that there was no mutuality between appellee and appellant as respects the optional feature of the contract, and no consideration for such option, is also settled against appellant in the above case of *Hays v. O'Brien*. The mutual covenants in the lease were a sufficient consideration for the option to purchase for the price which any other person would give in case appellant desired to sell the premises.

The leasing commenced on April 1, 1894, and appellant sold and conveyed the premises to Thomas Cornish, his son-in-law, November 30, 1894, for the sum of \$5,000.

Cornish sold a one-half interest in the lot immediately for \$2,500 to John Keppler, and afterward appellee purchased the lot of Cornish and Keppler for \$6,000.

This suit was brought to recover the difference between the price for which appellant sold the lot and what it was actually worth, and recovery as stated for \$1,000. The appellant admits that “the testimony of all the witnesses showed that at the time of the sale to Cornish the property was fairly worth \$6,000.”

The evidence clearly shows that appellant desired to sell the lot, because he did sell it, and it further shows that \$5,000 was as much as appellant had been offered and was what he was willing to take for the lot.

The appellant failed to give appellee the opportunity to purchase the lot as provided in the lease, except at the price of \$6,000, which was more than any other person would pay, so far as the evidence shows. No one had offered to pay more, and appellant was willing to receive \$5,000 for the lot. The spirit of the contract was that, in case appellant desired to sell the property and was willing to accept an offer, then appellee had the option to purchase at that price regardless of what appellant might have received from some other person if he had made the effort. In other words, a preference under the contract was to be given appellee to

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purchase at appellant's price, provided, the latter could not demand more than he could obtain from another.

When appellant would knock off the lot to the highest bidder the preference should go to appellee at the price offered. Appellant offered to show by Cornish that in addition to the \$5,000, he was to take \$1,000 out of his wife's share of the property, which the court refused.

In this there was no error. The spirit of the covenant in the lease was, that the person offering to purchase must offer cash or its equivalent, the same as appellee would be compelled to pay if he took the lot on the basis of the highest bid to appellant.

The exclusion of evidence as to what witnesses would have given for the lot if they had had an opportunity was not admissible, as will be seen from what we have said in regard to the legal effect of the contract.

What any person would pay can be, under the contract, tested alone by his offer and appellant's willingness to accept it.

The bill of exceptions in this case fails to contain a certificate of the judge trying the case that it contained all the evidence. It has in it a certificate of the reporter that it does. This is not adopted by the judge's certificate and is not sufficient. *Cogshall v. Beesley*, *Guardian*, 76 Ill. 445.

In the absence of a bill of exceptions showing that it contained all the evidence, the presumption is that the verdict is sustained by the proof.

Seeing no error in the record the judgment is affirmed.

James S. Quaintance v. Joseph Badham.

1. CHATTEL MORTGAGES—*Notes Secured by, Must so State.*—A chattel mortgage securing a note which fails to state upon its face that it is so secured, as required by the act of 1895 (*Hurd's Statutes*, 1895, page 1058), is absolutely void.

68	87
68	101
68	87
81	66
68	87
85	62
68	87
89	136

Replevin.—Appeal from the Circuit Court of Mercer County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

ROBERT L. WATSON and JAMES M. BROCK, attorneys for appellant.

BASSETT & BASSETT, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

On the 11th of July, 1895, appellee, and appellant as security, executed and delivered to R. W. Stewart five promissory notes for \$100 each, payable respectively on September 1, 1895, November 1, 1895, January 1, 1896, July 1, 1896, and September 1, 1896. On the 7th of August, 1895, for the purpose of securing payment of the notes and securing appellant as surety for him on the notes, appellee executed to R. W. Stewart and appellant a chattel mortgage on a well-drilling outfit. Appellee not paying the first note on the 1st of September, 1895, appellant, on the 3d of September, 1895, took possession of the outfit under the mortgage, and on September 6th, appellee replevied the property. On a trial in the Circuit Court, a jury being waived, the court held the mortgage void and rendered a judgment for appellee. Neither of the notes stated on its face that it was secured by chattel mortgage. Section 1 of the act of 1895, relating to notes secured by chattel mortgages, reads as follows:

"That all notes secured by chattel mortgages shall state upon their face that they are so secured, and when assigned by the payee therein named, shall be subject to all defenses existing between the payee and the payor of said notes the same as if said notes were held by the payee therein named, and any chattel mortgage securing notes which do not state upon their face the fact of such security, shall be absolutely void." Hurd's Statutes, 1895, page 1058.

Appellant seeks to avoid the effect of the statutory provision under the contentions, first, that the mortgage was not given to secure Quaintance as appellee's surety, and hence valid; second, that even if the instrument be held not good as a chattel mortgage, then it is binding between the parties as a contract.

Quaintance v. Badham.

A fair construction of the instrument shows that it was given as a security for the payment of the notes and for indemnity to appellant for becoming appellee's personal security. As the law stood prior to the adoption of the statutory provision above quoted, Stewart would have the right to take possession of the property, and sell it in accordance with the power of sale expressly contained in the mortgage; but, as the law now stands, he could not do so, for the reason that his notes do not, on their face, state that they are secured by such mortgage. For the same reason, his co-mortgagee, Quaintance, could not legally take possession of the property, and sell it to raise proceeds out of which to pay the debt. As a chattel mortgage, we hold that the instrument is absolutely void.

To the contention that, even if the instrument be held not good as a chattel mortgage it is binding on the parties as a contract, it may be answered that, as a contract, appellant would have no right to enforce it until he had been damnified. His counsel cite a decision of our Supreme Court, *Dunlap v. Epler & Callon*, 88 Ill. 82, in support of the position that, on default of payment of the first note by appellee, appellant has the right to take possession of the property, without waiting until he was compelled to pay it. In that case it was held that, where a note was given to secure the mortgage as surety on the mortgagor's note to a third party, and it was provided therein that the mortgagor should retain possession of the property until default in payment of the note at maturity, that in case of such default it was the duty of the mortgagee to take possession of the property, and that if he did not, he lost his right to, as against an execution creditor of the mortgagor. It should be observed, however, that in that case the court was speaking of a valid chattel mortgage in a case where the interest of the third parties were involved.

In this case we have an instrument where the instrument claimed to be a chattel mortgage is void as such. The authority is not in point. Judgment affirmed.

68	90
102	208

Illinois Central Railroad Co. v. Marie E. Kennicott.

1. **NEGLIGENCE**—*Getting Off of Cars While in Motion.*—A person who attempts to alight from a car while it is in motion is guilty of negligence.

2. **VERDICTS**—*When Manifestly Against the Evidence.*—A verdict which is manifestly against the weight of the evidence will not support a recovery.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 9, 1896.

W. R. HUNTER, attorney for appellant

EDWARD R. WOODLE, attorney for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by appellee to recover damages for injuries alleged to have been sustained by her while attempting to alight from one of appellant's suburban passenger trains at Kenwood station, near Chicago, upon which train she was a passenger on the evening of October 21, 1895. There was a trial by jury, resulting in a verdict and judgment for appellee, for \$2,000 damages and costs of suit.

The negligence charged in the declaration was:

1. So negligently managing the train, that as appellee was about to alight therefrom it was so violently and suddenly jolted and moved, that without fault on her part she was thereby thrown down and permanently injured.

2. That appellant wrongfully and willfully failed to sufficiently and properly light its station platform at Kenwood station whereby appellee, while attempting to alight from the train, without fault or negligence on her part, missed her footing, fell, and was thrown down, etc.

I. C. R. R. Co. v. Kennicott.

The plaintiff is an elderly lady, of the age of seventy-five years, who had lived at her present place of residence in Kenwood for some thirty-nine years, and was in the habit of riding on appellant's suburban trains to and from Chicago during all those years, frequently as often as three times per day. For many years she was a teacher, but lately has been in the real estate business, and swears she has made as high as \$5,000 a year in handling and speculating in real estate. On the afternoon of the day she was hurt she was negotiating a "deal," which was not consummated because of her injury. She swears that on that afternoon she had walked fifty-four blocks.

In her testimony appellee does not make much complaint that the station platform was not properly lighted, and that charge of negligence does not appear to be relied upon now, as the evidence seems to show that the platform was well lighted. But appellee claims that after the car stopped, as she was about to step off, it started suddenly forward to the north, then backward to the south, and forward to the north again, suddenly stopping and throwing her out upon the station platform, after bruising her hips against a knob on the gate of the car. As to the manner in which appellee got off the car, and received her injuries, her testimony stands alone, entirely uncorroborated.

The only other witnesses of the accident were all employes of appellant, five in number, who all contradict appellee as to material facts in the case. We see no reason why the jury should have entirely disregarded their testimony. It is insisted by the appellant that the evidence and the circumstances appearing in the evidence show that appellee attempted to get off the car before it came to a stop, and in this way was guilty of such negligence as precludes a recovery. The preponderance of the testimony certainly sustains this contention of appellant, and for that reason the verdict is not supported by the evidence. She herself swears that she passed out of the car upon the platform, and had hold of the railing before the car stopped, and it may be that supposing the train had stopped before

it had in fact done so, she attempted to step off, and was thrown down and injured. However this may be, we think upon the evidence the verdict was unwarranted, and for that reason the judgment must be reversed. We see no particular fault in the instructions.

The judgment will be reversed and the cause remanded.

William W. Taylor v. S. C. Harris.

1. **NEW TRIALS**—*Improper Remarks of Counsel*.—Where the remarks of counsel, on the final argument of a case, are highly improper and calculated to mislead and prejudice the jury against a party wrongfully, which counsel must have known, a verdict against such party should be set aside.

2. **INSTRUCTIONS**—*Error in, When Cured by a Remittitur*.—An error in an instruction upon the measure of damages may be cured by a remittitur.

Trespass, de bonis asportatis. Appeal from the Circuit Court of La Salle County: the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 9, 1896.

BREWER & STRAW, attorneys for appellant.

W. L. SEELEY and TRAINOR, BROWNE & AYERS, attorneys for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an action in trespass *de bonis asportatis*, brought by appellee against appellant as sheriff, for levying upon and selling property claimed to be owned by appellee under an execution in favor of Dupee Bros. and against Allen F. Kelly. The case was twice tried, the first trial resulting in a disagreement of the jury, the second in a verdict for appellee for \$992. The motion for a new trial was overruled and judgment rendered on the verdict, and appeal taken to this court.

Taylor v. Harris.

On June 6, 1896, appellee, by his attorneys, filed a remittitur in this court of \$47, said sum being made up of \$20 attorney's fees, testified to by appellee as having been paid out by him, and the balance, \$27, rebate received from the railroad company on the amount he paid for the cars in which he loaded the goods. Several causes are assigned for error, chief of which is that the evidence fails to support the verdict.

The appellee was a nephew of Allen F. Kelly, the defendant in the execution, who, it appears, was attempting to flee from his creditors, and who was attempting to ship the goods in question on board the cars from Illinois to Kansas. It appears that Kelly had considerable money with him, about \$2,500, besides \$980 appellee claims to have paid him. Kelly left secretly, without the knowledge of his neighbors, and loaded the property and stock upon the cars in the night time, so that he would not be seen at a station east of his usual trading point.

The evidence tends strongly to show that appellee Harris was assisting him (Kelly) in the attempt to get away without paying his debts. The appellee made contradictory statements as to how much money he had on the first trial and on the second trial. His evidence was contradictory throughout. The evidence tended strongly to show that the pretended payment by appellee to Kelly, for the goods in suit, was a sham and not a *bona fide* purchase, and that the passing of money between appellee and Kelly was merely colorable, to cover a fraudulent transaction. There appears also to have been no change of possession.

The instruction for plaintiff, No. 3, is complained of on the ground that the measure of damages was erroneous, but that seems to have been substantially cured by the remittitur. We think that the evidence fails to support the verdict, which was probably brought about by improper statements of the appellee's attorneys in their closing argument before the jury. They stated that the DuPee Bros., who were the real parties in interest in the suit, were millionaires, and owned nearly all the land in that

part of the county and had their millions, and that they would not notice or feel the payment of any judgment that the jury might render in the case; that the plaintiff in the case was a poor man, and if the jury rendered a verdict against him it would deprive him of all his accumulations and hard earnings and would practically turn him and his family out upon the road without anything; that J. A. DuPee and Ralph O. DuPee were hard and oppressive men, and had been so hard and oppressive in their usage of Allen F. Kelly that he could no longer continue to farm their land.

The above improper remarks were objected to and excepted to at the time by counsel for appellant, but the court made no ruling thereon.

Such remarks were highly improper and well calculated to mislead and prejudice the jury against appellant, wrongfully, which counsel, making them, must have known.

Remarks of this kind have often been condemned by the courts. *Chicago City Railway Company v. Barron*, 57 Ill. App. 469; *Brown v. Swineford*, 44 Wis. 282; *McDonald v. The People*, 126 Ill. 150; *Quinn v. The People*, 123 Ill. 333.

Taking into consideration the weakness of appellee's evidence, and the improper remarks above referred to, we think the judgment should be reversed.

The judgment is therefore reversed and the cause remanded.

E. J. Ogden v. Mary E. Wentworth and Frank E. Wentworth.

1. *LIMITATIONS—New Promise—When Sufficient.*—An acknowledgment of indebtedness of such a character as to clearly show a recognition of the debt and an intention to pay it, will remove the bar of the statute of limitations.

Assumpsit, for medical services. Appeal from the County Court of Lake County; the Hon. D. L. JONES, Judge, presiding. Heard in this

Ogden v. Wentworth.

court at the May term, 1896. Reversed and remanded. Opinion filed December 9, 1896.

CHARLES B. STAFFORD, attorney for appellant.

D. H. PINNEY, attorney for appellees.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Appellant commenced this suit on the 20th of August, 1895, to recover for medical services performed for appellees and their children, from 1881 to 1887, inclusive.

The amount claimed was \$340.

The only defense interposed was that the claim was barred by the five year statute of limitation. It was replied that the claim was taken out of the statute by a new promise, and upon that issue the case was tried, resulting in a verdict and judgment for appellees.

In reply to a letter from appellant, written in March, 1892, Mrs. Wentworth sent the following:

CHICAGO, March 24th.

DEAR DOCTOR OGDEN: Your bill and letter this morning was a surprise to me. I knew I owed you a bill, but I can hardly believe it is the amount you claim. I can do nothing about it at present, as I have pledged myself to pay so much a month on other debts until they are paid. When they are paid I will do the same by your claim, as I have no idea of trying to beat you, or any one else, out of money I owe them; you need not fear of your debt being outlawed.

Yours truly,

MARY WENTWORTH,
2324 Calumet Ave.

In reply to a letter written at a later date by appellant's attorney Mr. Wentworth sent the following:

MILBURN, LAKE COUNTY, ILL., March 1, 1895.

Chas. B. Stafford, Esq., Chicago.

DEAR SIR: Yours of Feb. 27th, at hand. We would like to have the bill of Dr. Ogden sent us. When it was

presented to us last, we think it was \$100 or \$125; are not positive which. The estate of Mr. Warren is not yet settled, and Mrs. W. is only allowed to draw for personal expenses. Our intentions are now, and have been always, to pay what is due the doctor and shall certainly do so at the earliest possible moment. Trusting this will be satisfactory, we are,

Very truly yours,

W. F. WENTWORTH.

In our opinion these letters were sufficient to take the case out of the bar of the statute and amount to such a promise to pay the debt as will support a recovery. *Horner et al. v. Starkey*, Admx., 27 Ill. 13.

The promise of Mrs. Wentworth was to pay the claim when she should finish paying other claims, which she was paying by monthly installments. The promise was not conditional and the court erred in instructing the jury that it was.

The judgment will be reversed and the cause remanded for another trial.

Elgin, J. & E. Ry. Co. v. D. F. Eselin.

1. *RAILROAD COMPANY--Coupling Cars.*—The business of coupling cars is very dangerous, and it is a duty which railroad companies owe to their employes to use great care in furnishing the best coupling appliances, and in keeping them in good repair.

2. *SAME--Duty to Brakeman.*—A brakeman contracting with a railroad company for the performance of his duties as such, assumes such risks as are incident to the discharge of his duties. It is the duty of the company to use all reasonable care to keep its couplings in good repair and to furnish safe appliances, and it will be liable to the brakeman for any injuries he may receive on account of its failure to perform this duty, provided the brakeman himself is not negligent in not knowing the condition of the couplings.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

E., J. & E. Ry. Co. v. Eselin.

WILLIAMS, HOLT & WHEELER, attorneys for appellant.

JAMES B. McCracken and ALBERT M. Cross, attorneys for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit by appellee against appellant to recover damages alleged to accrue to him, a brakeman, for injury received by him for being mashed through the hips, between two cars, while attempting to couple an engine tender onto a freight car, by reason of the coupling apparatus of the car he was coupling being out of repair.

It was alleged in the declaration, and there was proof tending to show, that there was no washer over the stem of the draw-bar on the vacancy between the back end of the draw-bar and the forward plate, by reason of which the cars came too close together to admit of the body of appellee being between the cars while coupling without being injured.

It was also averred in the declaration, and the proof tended to show, that there was need of blocks on the beam at the hind end of the engine-car and between that and the "nigger-head," so called, where it was bolted onto the beam in order that there would be sufficient space between the cars when being coupled to prevent injury to the coupler.

It appears from the evidence that by reason of the coupling apparatus being out of repair the cars came together within nine to thirteen inches where being coupled, when they should not have come nearer together than from sixteen to twenty inches.

The evidence tended to show that the appellee was unacquainted with the condition of the draw-bar on the freight car and also with the engine on which he was riding after it was promised to be repaired.

The evidence tends to show that appellee's contention that he was injured on account of the negligence of the company in using cars with a dangerous coupling apparatus was correct, and that appellee was in exercise of ordinary care, in

using the engine and in coupling the cars, for his own safety. There are a number of objections urged by appellant against the ruling of the court on the admission of evidence. The supposed errors, if any, were of trifling character and could not have affected the verdict. The rulings of the court, however, we regard as correct.

There is no complaint made on the part of the appellant on account of giving or refusing instructions by the court.

The verdict was for \$12,000, and under the requirements of the court there was a remittitur of \$7,000, and judgment rendered on the verdict for the plaintiff for \$5,000.

It is insisted that the evidence fails to support the verdict in the particulars, first, that there was no sufficient evidence to establish the fact that the coupling apparatus on the two cars was out of repair, as alleged in the declaration, and second, that appellee failed to prove the exercise of reasonable care for his own safety and was therefore guilty of contributory negligence.

It appears from the evidence that the appellee in coupling the cars was riding on the back end of the engine, with his feet on the brake-beam of the engine and his right arm over the ladder, and that he hung there in that way, making ready to guide the link on the engine into the draw-bar of the freight car with his left hand. The brake-beam hung back under the engine at least a foot under the end of the tender, and there was no foot board on the tank of the engine. The upper portion of his body was sustained by his right arm thrust through an iron ladder, running up the back of the tank on the top of the tender, and holding his lantern in his right hand, it being in the night time. The engine was moving very slowly and as the sills came together appellee was squeezed through the hips.

It is insisted that this was a dangerous position for the appellee to occupy, and that if appellee did occupy such a position he was negligent in not holding his body more squarely with the end of the cars, instead of standing in a diagonal position, whereby the wide part of his body would be presented to be squeezed by the cars. We do not think

this contention can be maintained. It was a question for the jury, and the evidence tended to show that the position appellee maintained in riding on the tender to make the coupling was safer than it would have been if he had been on the ground standing between the cars, for the track was rough and it was in the night time, and he stood the same danger of being squeezed by the imperfect coupling apparatus, and appellee had no reason to suspect that the coupling apparatus was out of repair.

We think that the jury was justified in finding that a coupling apparatus so arranged as to allow the ends of the cars to come within nine to thirteen inches of each other when being coupled was imperfect and dangerous, and that appellant with proper care should have known the condition of the cars and repaired the coupling, and that it was justified in finding that appellee was in nowise negligent in not discovering the defective conditions of the cars himself.

The evidence tended to show that this was the first time that he had ever made a coupling of this tender to this car, and that it was the first trip he had ever made with them.

The business of coupling cars is very dangerous at best, and a railroad company should use great care in furnishing the best coupling appliances and in keeping them in good repair. They owe this duty to their employees.

While it is true that appellee, in contracting for the performance of such hazardous duties as he was performing, assumed such risks as were incident to their discharge, yet it was the duty of the company to use all reasonable care to keep its machinery in good repair and to furnish safe appliances, and it would be liable to appellee for any injuries he might receive on account of failure to perform this duty, provided he was not negligent in not knowing the condition of the cars, in which case he would be held to assume the risk himself. But as we have before stated, we think the jury was justified in finding these points in favor of the appellee. It will not be necessary for us to examine the evidence in detail for the purpose of reconciling contradictions in it. It is sufficient, however, to say that we think the jury was justified in its verdict.

As to the measure of damages, we think the evidence sustains the verdict on that point after the remittitur.

It tended to show a case of chronic hip-joint disease in its early stages occasioned by the accident and that appellee's injuries were permanent.

Seeing no error in the record the judgment of the court below is affirmed.

James S. Quaintance v. Joseph Badham.

1. VERDICT—*Upon Conflicting Evidence*.—A verdict upon conflicting evidence is, in general, conclusive.

Assumpsit.—Appeal from the Circuit Court of Mercer County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

JAMES M. BROOK, attorney for appellant.

BASSETT & BASSETT, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Appellee entered into a contract to drive a well upon appellant's farm, and get a good supply of water, for which appellant was to pay him \$1.50 per foot through soil and \$2 per foot through rock. On the third of September, 1895, while appellee was at work, appellant seized the machinery with which appellee was at work, by virtue of a chattel mortgage which we hold to be void, and thereby stopped the work. A few days afterward appellee replevied the machinery and offered to go on with the work, but appellant would not allow him to do so.

This suit followed, which was defended on the ground that appellee had not complied with his contract, which, it was contended, was to procure water by September 1, 1895, and

Mackin v. Delles.

that appellee was, while working, to abstain from intoxicants.

Appellee recovered a judgment against appellant for \$292.50. There was a conflict in the evidence as to when the work was to be completed. In the conflict it was the peculiar province of the jury to decide. We think the verdict supported by the evidence.

There was no error of the court in refusing to allow the chattel mortgage to go in evidence. Our reasons for holding the chattel mortgage void are fully set forth in the replevin suit between Quaintance and Badham, page 87, *ante*, and need not be repeated in this opinion. Appellant was not justified in taking possession of the machinery and thereby stopping the work. There was no error committed by the court in the giving or refusing of instructions. Judgment affirmed.

Joseph C. Mackin and Clara G. Mackin v. A. M. Bauer
Delles.

1. COURTS—*Discretion, and Abuse Thereof*.—Motions for leave to file supplementary affidavits on applications for continuances, and to set aside orders of dismissal and the like, are addressed to the sound discretion of the trial court, and unless there is a palpable abuse of such discretion the action of the court will not be disturbed.

Assumpsit, for wages, etc. Appeal from the Circuit Court of DuPage County; the Hon. CLARK W. UPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

M. V. GANNON, ALFRED MOORE, and SAMUEL RICHOLSON,
attorneys for appellants.

H. H. GOODRICH, attorney for appellee; McDougall &
Chapman, of counsel.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE
COURT.

This suit was originally brought before a justice of the

peace to recover wages claimed to be owing to appellee by appellants. The latter not appearing before the justice, the appellee recovered a judgment for \$159.50, and appellants took the case to the Circuit Court by appeal.

At the March term, 1895, of that court, appellants obtained a continuance on the ground that their attorney was a member of the State Senate, in attendance upon its sessions.

At the next term of the court, appellants again applied for a continuance, on the ground of the absence of material witnesses. The affidavit on which the application was based was filed October 7, 1895, and on the 9th of October, 1895, appellants, by their attorney, asked leave to file a supplemental affidavit for a continuance, but the court refused the leave and overruled the motion for a continuance, to which ruling of the court appellants excepted.

On the following day, October 10, 1895, upon the regular call of the docket, appellants and their attorney being absent and failing to answer, the appeal was dismissed, and a *procedendo* to the justice was awarded. On the 15th of October, 1895, appellants filed their motion to set aside the order of dismissal, which motion was, by the court, overruled. And this is assigned for error.

We think there was no error on the part of the court in refusing leave to file the supplemental affidavit for a continuance. The affidavit for a continuance was insufficient, and there was no error in overruling the motion to continue.

Nor was there any error in overruling the motion to set aside the order of dismissal and reinstate the case. Such motions are addressed to the sound discretion of the trial court, and unless there is a palpable abuse of the discretion, the decision of that court will not be disturbed. In this case, no sufficient reason was shown for setting aside the order of dismissal and reinstating the case, and we can not see that the court in any way abused its discretion.

The motion in arrest of judgment was properly overruled. Finding no error in the record, the judgment will be affirmed.

Anselme Robillard v. Alfred Beaupre.

1. DIVISION FENCES—*Selection of Windbreaks.*—Under the statute the owner of a division hedge fence has the right to retain, untrimmed, as a windbreak for his cattle, not exceeding thirty rods of such hedge, at any place on such fence where he sees fit to select it.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1896. Reversed. Opinion filed December 9, 1896.

PADDOCK & COOPER, attorneys for appellant.

H. L. RICHARDSON, attorney for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant before a justice of the peace, to recover the costs of trimming a willow hedge which formed a division fence between their respective lands. The fence had stood for some twenty-seven years, and had never been trimmed. Appellee had purchased the land adjoining that of appellant in the spring of 1895, his deed being dated March 1, 1895. On March 11, 1895, he served notice on appellant to trim the hedge, and on the latter failing to do so, appellee had the work done at a cost of \$8.75, the trimming being completed by May 2, 1895. This suit was brought under the provisions of section 3, chapter 54 of the Revised Statutes, as amended in 1889. 3 Starr & Curtis, 629.

In the Circuit Court on the trial of the cause on appeal, appellee recovered a judgment for \$8.75 and costs. Appellant makes two principal points as grounds of reversal, viz.: 1. That he had in any event, until June 15th of the year in which notice was served upon him, to trim the hedge, and that appellee had no right to trim it before that time and then sue appellant for the costs. 2. That under the stat-

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ute he had the right to retain, untrimmed, not exceeding thirty rods of the hedge, as a windbreak for his cattle, at any place on the line fence where he saw fit to select it in his own hedge.

In the view we take of the case, it is unnecessary to express any opinion upon the first proposition, but upon the second, we think the contention of appellant must be sustained. The evidence shows that the fence, where the willows were trimmed, ran along a piece of unbroken land belonging to appellant, which he wanted for a pasture, and when the notice was served upon him to trim the hedge, he informed appellee he desired to keep that hedge as a windbreak for his cattle. We think, under the provisions of the section of the statute referred to, appellant had the right to select the ten rods of hedge in controversy as a windbreak, if he chose to do so, and he was not bound to trim it. The court properly instructed the jury on this point; but they found contrary to the instructions and we think the motion for a new trial should have been granted. There was no error in refusing the first instruction asked by appellant, for the reason there was no evidence as to the date of the delivery of the deed. Nor was there any error in refusing the third instruction.

For the error in failing to grant a new trial the judgment must be reversed, but inasmuch as there can be no recovery for the reasons above given, the cause will not be remanded.

Peoria Malting Company v. Davenport Grain and Malt Company.

1. **PATENT RIGHT—*Estoppel to Deny its Validity.***—A person having had the use and benefit of a patent right, can not defend an action brought to recover the purchase price of it, on the ground of its invalidity, unless actually disturbed in the enjoyment of such patent right.

2. **PATENTS—*License to Use Not an Assignment.***—A license to manufacture a patented article and to make use of an invention covered by

Peoria Malting Co. v. Davenport Grain & Malt Co.

letters patent, is not an assignment, and need not be recorded under the patent laws as such, to insure its validity.

3. *INTEREST—On Written Contracts.*—Money, payable under a written contract, unless otherwise specified, is due as soon as the contract is made, and draws interest, under the statute, from such date.

4. *CONTRACTS—Acceptance by Letter.*—When one party made a draft of a contract and sent it to the other party and he returned it together with a letter, saying, "we accept the contract," *it was held* binding upon such party.

Assumpsit.—Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

ISAAC J. LEVINSON, attorney for appellant.

STEVENS, HORTON & ABBOTT, attorneys for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit, brought by the appellee against the appellant, for a house right to use a certain malting machine, claimed to be owned by appellee, of certain patents issued to Henry Noth and John Noth, and a license granted thereunder by them and Mina Noth, who claimed some interest therein, to the appellee.

The declaration contained only the common counts and there was a plea of the general issue only. The appellant and the appellee, one under the laws of Illinois, and the other under the laws of Iowa, were duly organized and incorporated. The contract under which the recovery was sought was, in substance, that in consideration of the sum of \$1,000, to be paid by the appellant to the appellee, the latter sold, conveyed, assigned and set over to appellant a house right under the patents on malting machines then held by Henry and John Noth of Davenport, Iowa, under letters patent to them of the United States. The license included the right to appellant to erect and operate a malthouse in the city of Peoria, Illinois, and therein to use the invention or inventions covered by the said letters patent. There was a warranty in the contract against all damages caused from expenses to the extent only of \$1,000 arising to the appellant on ac-

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count of judgments against appellant for infringements, provided that in the event an action should be brought against appellant for such infringements, it should at once notify appellee of the pendency of such action and give it an opportunity to make defense or to assist in the defense of such actions.

The same case was tried by a jury and resulted in a verdict for \$1,000 and interest from March 4, 1892, in favor of appellee, upon which judgment was rendered.

From this judgment this appeal is taken.

It appears that a verbal contract had been entered into in Davenport, Iowa, between the parties in this suit, in substance, as above stated, and the appellant commenced the erection of the malt house in Peoria early in 1892, and all the parties interested in the patent had been present at the conference, and Mina Noth, who was interested in the Davenport Malt and Grain Company, the appellee, in its contract between it and her, consented in writing, to the agreement between appellant and appellee to erect the malt mill in Peoria, which agreement was dated the 26th day of December, 1891.

About March, 1892, a written draft of the contract was made out by appellee and sent to appellant, to Peoria, inclosed in a letter, inquiring what disposition they proposed making of the contract. To this appellant replied by letter, signed by it, by Albert Woolner, its secretary, dated March 4, 1892, in which it stated, "We accept the contract, but think you ought to give us time on the money, at least until the building is up and in running order," and inclosed the contract and returned it to appellee.

It is argued by counsel for appellant that the agreement in writing between it and appellee, and the assignment by the patentees to appellee of the license under the patent, amount to a conveyance of the entire patent, and is invalid unless recorded, and he disputes the right of Albert Woolner, appellant's secretary, to accept the contract, and he questions the right to recover interest.

We think that the assignment to appellee by the Noths,

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was not the assignment of the patent, but a mere license. Neither was the contract between appellee and appellant anything but a license; therefore the refusal of the court to instruct the jury to that effect was not error. And even if it had been an assignment instead of a license, a recording of the patent would not have been necessary to make the contract binding.

The appellant having had the use and benefit of the patent can not defend on the ground of its invalidity unless actually disturbed in its enjoyment of the patent right. *Buss v. Putney*, 38 N. H. 44; *Havana Press Drill Company v. Ashurst*, 148 Ill. 115; *Platt v. Fire Extinguisher Mfg. Co.*, 59 Fed. 897.

It is insisted further, that the letter written by Albert Woolner is not admissible, but we think the evidence justified the jury and the court in finding that he had the power to write the letter. It is insisted that the damages are excessive, in that the appellee had no right to recover interest, and that Sec. 2, Chap. 74, Revised Statutes, does not allow interest in a case like this.

We think, however, that the clause in that statute allowing interest to be recovered on money due on instruments of writing would cover this case. It will appear from the evidence, that while the contract was verbal in the first instance, it was afterward reduced to writing, and, as we hold, agreed to by the parties, and on the part of the appellant accepted by the company by Albert Woolner, its authorized agent, in the letter which he wrote accompanying the contract.

The money was due as soon as the contract was accepted.

The question whether there was vexatious and unreasonable delay in the payment of the money need not be considered by us, as we hold interest can be recovered under the written contract.

The above were the only objections to the verdict and judgment made in appellant's brief.

Holding, therefore, that there has been no error committed by the court below, the judgment is affirmed.

Joseph C. Mackin and Clara G. Mackin v. Hiram H. Cody.

1. *PRACTICE—Motions for Continuance.*—The statute requiring a motion for a continuance to be supported by affidavit is sufficiently complied with by the oath of applicant heard in open court, where no objection is made at the trial to the manner in which the motion was supported.

2. *CONTINUANCES—Attorney a Member of the Legislature.*—An affidavit, in support of a motion for a continuance, upon the ground that the attorney of the applicant is a member of the legislature, which fails to state that such attorney is in actual attendance upon the session of the legislature, is not sufficient.

3. *AFFIDAVITS—When a Part of the Record.*—Affidavits made in support of a motion for a continuance can become a part of the record only by being made a part of the bill of exceptions.

Forcible Detainer.—Appeal from the County Court of Du Page County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

M. V. GANNON, ALFRED MOORE and SAMUEL RICHOLSON,
attorneys for appellants.

H. H. GOODRICH and H. R. CODY, attorneys for appellee;
McDOUGALL & CHAPMAN, of counsel.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION
OF THE COURT.

This was an action of forcible detainer against appellants, in which appellee recovered before a justice of the peace, and also in the County Court on an appeal.

The only ground on which a reversal is asked is that the court erred in overruling appellants' motion for a continuance.

The motion was made because of the absence of appellants' attorney, who was at the time of the trial a member of the legislature. The bill of exceptions shows that the motion was supported by the oath of appellant, Joseph C. Mackin, heard in open court. It is urged that as the

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statute requires the motion to be supported by affidavit, the court properly overruled the motion. It does not appear that any objection was made to the manner in which the motion was supported, and we are inclined to the opinion that where the motion is supported by an oral affidavit, heard in open court without objection, which is not in writing, that the law in that regard is answered.

The oral affidavit made in this case, however, was defective because it did not state that appellants' attorney was in actual attendance upon the session of the legislature; such averment the statute requires. *Williams v. Baker*, 67 Ill. 238; *Stockley v. Goodwin*, 78 Ill. 127; *Joiner v. Commissioners, etc.*, 17 Ill. App. 607.

Among the papers in this case in this court, as an additional transcript, is an affidavit purporting to have been made. Appellants urge it is sufficient. It forms no part of the bill of exceptions and has been stricken from the files for that reason.

Affidavits made in support of a motion for continuance can become part of the record only by being made a part of the bill of exceptions. *Roundy v. Hunt*, 24 Ill. 598; *Smith v. Wilson*, 26 Ill. 186; *Bedee v. People, etc.*, 73 Ill. 320; *Hulett v. Ames*, 74 Ill. 253.

Judgment affirmed.

William W. Taylor v. Hulda T. Smith.

1. *PREFERENCES—Debtor in Failing Circumstances.*—A debtor in failing circumstances has a right to make preferred creditors provided he does so in good faith.

Trover, for the wrongful taking of a stock of goods. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

LINCOLN & STEAD, and STOOKWELL & BECK, attorneys for appellant.

FOWLER BROTHERS, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was commenced by appellee against appellant, as sheriff, to recover for the wrongful taking of a stock of wall paper, belonging to her, under an execution issued from the Superior Court of Cook County, upon a judgment in favor of the National Wall Paper Company against William C. Meecham.

There was a recovery in favor of appellee for \$1,489.12.

The evidence upon the trial shows that in October, 1892, appellee and William O. Meecham engaged as partners in the wall paper business at Ottawa, Illinois. After continuing the business for one year appellee sold her interest to Meecham for \$1,200, taking therefor from him six promissory notes for \$200 each, payable in one, two, three, four, five, and six years. Meecham continued the business on his own account.

He became largely indebted to the National Wall Paper Company, which, after procuring a judgment note from him, entered judgment upon it in the Superior Court of Cook County. An execution issued from that judgment which was sent to appellant, as the sheriff of LaSalle county, and reached his hands on the afternoon of October 3, 1894. He levied the writ upon the goods in question, which he found in the possession of the appellee, and sold them.

Appellee based her right to the goods upon a purchase of them made upon the 2d of October, 1894, from Meecham. The consideration paid was the six unpaid notes which she held against Meecham. There is no doubt under the evidence that appellee so purchased the goods for the purpose of saving her debt or that she obtained possession of them before the execution reached the hands of the appellant.

Counsel contends that the transfer of the stock was not a *bona fide* sale, but was simply a shift upon the part of Meecham and appellant to defraud the paper company. The evidence does not bear them out in that contention. It is undisputed that appellee originally furnished \$1,000 to

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the business; that when she retired in 1893 she received the six notes for her interest and that at the time of her purchase the notes were unpaid. The effect of the sale to her by Meecham was of course to make her a preferred creditor. But Meecham had the right to make her such.

We think it was done in good faith.

Complaint is made that the damages allowed were excessive.

There was great disparity in the testimony of witnesses as to the value of the goods, but we think there was evidence to support the verdict upon that point.

No error as to instructions appears to have been made by the court.

Judgment affirmed.

Kingston Mutual County Fire and Lightning Insurance Company v. Susan E. Olmstead, Executrix, etc.

1. **INSURANCE**—*Right to Declare the Policy Void for False Statement in the Application, Waived.*—Where a contract of insurance expressly makes the application a part of the policy, any false statement of matter therein, material to the risk, by the applicant, will authorize the insurer to avoid the policy; but if the insurer receives premiums upon such policy after notice or knowledge of such false statement, the right to declare the policy void will be waived.

Assumpsit, on a policy of insurance. Appeal from the Circuit Court of DeKalb County; the Hon. CHARLES KELLUM, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

STEPHENS & EARLEY, attorneys for appellant; WILLIAM LATHROP, of counsel.

CARNES & DUNTON, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit by appellee, as executrix of the will of Albert A. Olmstead, deceased, against appel-

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lant, upon a policy of insurance covering real and personal property. There was a trial by jury resulting in a verdict and judgment in favor of appellee for \$2,200.

The policy was issued on the 9th of August, 1869, upon the application of the owner, Albert A. Olmstead, who lost his life in the fire which destroyed the property for which the suit was brought.

The defense interposed in the trial court was, that the insured in his application falsely represented that the land on which the burned building stood was unincumbered, whereas they were incumbered to exceed \$6,000, and that such false representation was so material as to render the policy void.

It is undisputed that the property at the time of the application was incumbered to the extent of \$6,000, and that Olmstead, in answer to the questions, "Is the property incumbered? If so, to what amount?" answered, "No."

The contract of insurance expressly makes the application a part of the policy. In the application following the questions and answers is this clause: "The said applicant hereby covenants and agrees to and with said company, that the foregoing is a just, true and full exposition of all the facts and circumstances in regard to the condition, value and risk of the property to be insured, so far as the same are known to the applicant and material to the risk."

Inasmuch as the evidence shows that the value of the tract of land was at the time of the application \$12,000, it is contended by appellee that the statement that there was no incumbrance was true, because there was in fact no incumbrance material to the risk. In one of the by-laws of appellant it is provided that no property shall be insured which is covered by mortgage of more than two-thirds its value, except where the mortgagee joins in the application.

The force of the contention is that as the incumbrance was at the time of the application far below two-thirds of the value of the premises, the false statement of Olmstead was not material, and can not be regarded as sufficient to avoid the policy. We can not agree with appellee in this view.

Where specific inquiry is made as to incumbrances upon property to be insured, the applicant must make truthful answers. If the statements made in the application are merely representations (and the statement in question belongs to that class), then the answers must be substantially true. They must necessarily be, to enable the insurer to decide whether to decline the risk or place it in a lower instead of a higher class of hazard. If the false answer is insignificant and in no wise material to the risk it would not, of course, avoid the policy. But it can not be regarded as immaterial that the applicant for insurance represents that there is no incumbrance on the property when there is a valid and subsisting mortgage upon it for more than half its value.

We think, however, that while the appellant, by reason of Olmstead's false answer as to the incumbrance, had the right to declare the policy void, it waived its right by its action after the fire.

The fire occurred on the 13th of July, 1893. In appellant company losses are paid by assessments on policy holders. On the 24th of July an assessment was levied to meet this loss. On the 4th of August appellee paid the amount of her assessment, \$10. About the same time, appellant's president was notified of the existence of the mortgage, and on the 24th of August, a bill was filed to foreclose it, to which appellant was made a party defendant. The evidence is not clear that the president was notified of the mortgage before appellee's \$10 was received; but it is clear that he was served with summons in the foreclosure suit within a few days thereafter. It had full notice of the existence of the mortgage within a month after an assessment to pay the loss had been ordered, and yet it did not elect to declare the policy void because of the misrepresentation until the 2d of January, 1894, retaining, in the meantime, the money which by assessment had been raised to pay the loss, including the \$10 paid by appellee. During all the time it kept itself in position to assess appellee for other losses, should any occur.

If the misrepresentation was so material as to entitle appellant to cancel and avoid the policy, it was its duty to so declare within a reasonable time after obtaining knowledge of the existence of the mortgage; and the ninety days from the date of adjustment allowed by the terms of the policy. There was other property covered by the policy than that destroyed by the fire. The action of appellant in retaining appellee's money, and declining to claim any advantage by reason of her husband's false statement after learning of its falsity would, of course, lead her to the conclusion that the other property was protected by insurance. Our views as to waiver are sustained by the following authorities: Northwestern Mutual Life Insurance Co. v. American, 119 Ill. 329; Schreiber v. German American Hail Insurance Co., 43 Minn. 367; Peoria Sugar Refinery v. Susquehanna Mutual Fire Ins. Co., 20 Fed. Rep. 480; Oakes v. Manufacturers Ins. Co., 135 Mass. 248; Wood on Fire Insurance, Chapter 20.

Entertaining the opinion, as we do, that the right to declare the policy void was waived by the acts of appellant after it obtained knowledge of the falsity of Olmstead's statement concerning incumbrance, we deem it unnecessary to discuss the alleged errors of the trial court in passing upon instructions.

The judgment does substantial justice, and should be affirmed.

William W. Taylor v. Oscar P. Thurber.

1. *SALES—Delivery of Purchaser's Property.*—While the general rule is that there must be a delivery of the property sold to make the sale effective as to execution creditors, yet a manual change of possession is not absolutely required where the property is of such a heavy and bulky nature as to render its immediate removal impracticable.

Replevin.—Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

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SNOW & HINEBAUGH, attorneys for appellant.

CLARENCE GRIGGS, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was an action of replevin by appellee to recover possession of 70,000 brick in kiln in the brick yard of Grant, Robson & Co. which has been levied upon by appellant, as sheriff of La Salle county, under an execution in favor of Mac. J. and James Killelea and against Grant Robson & Co., dated November 2, 1894.

Appellee claimed the brick by virtue of a purchase made October 8, 1894. The only question involved is: Was there, before the levy of the execution, a sufficient delivery of the brick?

On the date of the purchase appellee, who was engaged as contractor in the construction of a school house at Mar-seilles, situated about three-fourths of a mile from the brick yard, made a contract with O. S. Grant, manager of the firm of Grant, Robson & Co., for the purchase of all the brick in the kiln at \$6 per thousand. It was not definitely known how many brick were in the kiln but they were to be counted as they were unloaded at the school house yard. There were a number of outstanding claims against the firm and it was agreed that payment of them should be made out of the purchase price of the brick. While the brick were being hauled appellant, on the 16th, 19th and 20th days of October, accepted four orders covering such claims aggregating \$555.03.

The brick at the purchase price amounted to \$597. Forty-four thousand, seven hundred and twenty-five of the brick were delivered at the school house yard before the execution issued.

We think the purchase was complete and there was such a transfer of title of all the brick in the kiln to the purchaser as to render them free from execution levy.

When the purchase was made appellee took all the possession that the ponderous character of the property would

permit. While the general rule is that there must be a delivery of the property sold to make the sale effective as to execution creditors, yet a manual change of possession is not absolutely required where the property is of such a heavy and bulky nature as to render its immediate removal impracticable. *Thompson v. Wilhite*, 81 Ill. 356; *Ticknor v. McClelland et al.*, 84 Ill. 471.

This case falls within the class mentioned.

Judgment affirmed.

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172	563
68	116
85	237
68	116
184	141

Commercial National Bank v. Hugh Kirkwood et al.

1. **GARNISHMENT**—*Rights of Garnishing Creditors.*—A garnishing creditor can have no greater right to recover from the garnishee than the debtor has.

Garnishment.—Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

STATEMENT OF THE CASE.

On the 28th of December, 1892, Allen C. Rush entered into a contract in writing with Jefferson Orr and Ella M. Orr, whereby he agreed, in consideration of \$20,280, to convey to Jefferson Orr, the west half of the northwest quarter of section 31, T. 5 S., R. 3, W. of the 4th P. M., and to Ella M. Orr the north half of the southeast quarter and the east half of the northeast quarter of section 36, T. 3 S., R. 4, W. of the 4th P. M., all situated in Pike county, Illinois.

The exact terms as to payment were deferred until the following Monday, January 2, 1893. On the last mentioned date, after the parties had met for the purpose of consummating the deal, Orr learned that on the Saturday before, December 31, 1893, the firm of Kirkwood, Miller & Co. (of which Rush was a member), wholesale dealers in agricultural implements at Peoria, had made an assignment to Isaac C. Edwards for the benefit of creditors. Deeds of

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conveyance had been executed by Rush, and filed of record, and Orr had indorsed notes to Rush in payment of the amount of \$10,000, when Orr learned that fact. He refused to pay Rush the balance of the purchase money in cash. The notes were returned to him, and as Rush desired to secure his individual creditors, it was agreed the land deal should stand, and Orr executed an agreement in writing whereby he stipulated to pay \$18,920 to individual creditors of Rush, therein named, whenever it should be determined that title to the land was clear and free from all liens and claims.

On the same day, appellant sued out an attachment against the firm of Kirkwood, Miller & Co., and on January 7, 1893, Jefferson Orr and Ella M. Orr were served as garnishees. Answers were filed by the garnishees showing the above facts.

Benjamin Newman and others, individual creditors of Rush, and named as beneficiaries in the agreement between Orr and Rush, dated January 2, 1893, filed intervening petitions, claiming the funds in Orr's hands should be paid them, as provided by that agreement. Upon a trial the Circuit Court found the issues in favor of the intervening petitioners, and rendered judgment that Orr should pay \$15,520 to the petitioners, as provided by the agreement, in sums due them respectively.

From that judgment appellant prosecutes this appeal.

LEWIN & SLEMMONS, attorneys for appellant.

MATTHEWS, HIGBEE & GRIGSBY and A. G. CRAWFORD, attorneys for appellees.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

The controversy in this case is over funds held in the hands of Jefferson Orr, a garnishee, as purchase money for lands conveyed by Allen C. Rush, a defendant in an attachment suit by appellant. Before service upon the garnishee,

he had agreed in writing to pay to individual creditors of Rush, the funds in controversy. The judgment of the trial court to so pay them was in effect a holding that the agreement between Orr and Rush was such an appropriation of the funds in the hands of Orr in favor of the individual creditors named, as to place them beyond the reach of appellant's garnishee process.

It is insisted by appellant that the funds were liable to its process because the intervenors had not accepted the provisions of the contract between Rush and Orr, whereby the latter was to pay them, and that before there could be an equitable assignment of the funds to carry it beyond the control of Rush, or his attaching creditors, there must have been a total extinguishment of the old debts and a substitution of the new obligation.

The evidence shows that while the purpose of the contract was to protect Orr, it was, in effect, one for the benefit of Rush's individual creditors. By it the funds were taken out of the control of Rush. The creditors named were notified by Orr before he was served with the garnishee process and some of them demanded payment. Orr promised payment in accordance with the writing when it should be determined that Rush's title to the land was clear and free from all claims that could prejudice the rights of a purchaser.

Under the circumstances it was not necessary that the creditors should have relinquished all claim against Rush. All that was necessary on their part was an acquiescence in the arrangement made by the agreement; Rush was then in no position to rescind the contract.

The intervenors were not prejudiced in their right to the fund by filing their claims with the assignee of Kirkwood, Miller & Co. That did not estop them from claiming that they had acquiesced in the agreement between Orr & Rush.

Rush having by his agreement parted with his right to control the fund in Orr's hands, the appellant, as an attaching creditor, had no right to it. A garnishing creditor can

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have no greater right to recover from the garnishee than the debtor has. Webster et al. v. Steele et al., 75 Ill. 544; Richardson et al. v. Lester et al., 85 Ill. 55.

We see no error in the judgment appealed from. The judgment is affirmed.

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| 109 540 |

Abraham A. Willett et al. v. John A. Maxwell et al.

1. **USURY—*Mortgages to Secure Pre-existing Debts.***—The fact that, in making up the amount to be secured by a mortgage, a note held by the mortgagee against the mortgagor is included as a part of the mortgage debt, does not render the transaction usurious, although the amount to be secured be made payable at a future date and interest thereon be deducted in advance.

2. **LIMITATIONS—*Mortgage Foreclosures.***—A suit to foreclose a mortgage, given to secure a note, may be brought at any time within ten years from the date of the last payment indorsed upon the note.

Mortgage Foreclosure.—Appeal from the Circuit Court of Mercer County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

PEPPER & SCOTT, attorneys for appellants.

JAMES M. WILSON, attorney for appellees.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was a suit in equity upon a bill filed by appellee against appellants, to foreclose a mortgage given to secure a note for \$1,400, executed by appellants to appellee. The defenses interposed were usury, the statute of limitations, and payment.

There were several references to the master to take and report proofs and his findings thereon, and to compute the amount due upon the note, and upon a final hearing there was a decree in favor of appellee for the sum of \$1,880.04, with the usual provisions as to foreclosure and sale in default

of payment. Appellants prosecute this appeal and assign various errors, and appellee assigns cross-errors complaining that the court erroneously ordered the master to charge appellee with various items of credit to appellants amounting to \$408.96 by which amount he insists the decree is too small. On a former hearing of the cause the court below sustained the defense of usury, and decreed against appellee Maxwell, who brought the case to this court, where the decree was reversed, this court holding that on the facts then appearing in the record the defense of usury was not sustained. *Maxwell v. Willett et al.*, 49 Ill. App. 564.

The only substantial difference between the proofs then and now upon that point is, that it now appears the \$1,260 involved in this suit was made up in part of the amount due upon a note for \$500, then held by appellee against appellant, and which was treated as cash and the old note surrendered in making up the new loan. We think that fact made no difference. The surrender of the old note was equivalent to an advancement of so much cash in making up the new loan, and was so treated by the parties. There was no usury in the transaction. We do not regard the case of *First Nat. Bank v. Davis*, 108 Ill. 633, as militating against the views expressed by us in this case as reported in 49 Ill. App. 564, *supra*.

The defense of the statute of limitations was not sustained. There is no pretense that appellants did not pay interest annually on the principal indebtedness, and the proofs show that indorsements of the payments were made on the note, in writing, from time to time as they were made. It was not necessary this writing should be signed by appellants in order to keep the note alive and prevent the bar of the statute of limitations. *Bowles v. Keator et al.*, 47 App. 98.

It is the well recognized law of this State that a suit to foreclose the mortgage given to secure a note may be brought at any time within ten years from the date of the last payment indorsed upon the note. *Zeigler v. Tenery*, 23 Ill. App. 133; *Baldwin v. Baldwin*, 36 Ib. 176; *Schif-*

ferstein v. Allison, 24 Ib. 294; Schifferstein v. Allison, 123 Ill. 662.

In this case the last indorsement of interest paid upon the note was dated January 7, 1891, so that this suit was brought in apt time.

There was no error on the part of the court in decreeing against the defenses of usury and the statute of limitations.

As to the cross-errors assigned by appellee, we are not disposed to interfere with the action of the court in allowing the various credits to appellants of which appellee now complains. The evidence concerning some of these credits is confused and unsatisfactory, but the court below had better opportunities of coming to a correct conclusion on these points than we have, and we will not disturb its findings.

On the evidence, we think justice has been done between the parties by the decree, and it will be affirmed.

D. F. Dumser v. C. J. Underwood.

1. **NECESSARIES**—*Furnished Without the Parent's Consent.*—Where a person furnishes necessities to a minor without authority from the parent he does so at his peril, and in order to recover from the parent he must show either an express authority or circumstances from which authority may be implied.

2. **SAME**—*The Parent to be the Judge.*—The parent is to be the judge of the wants of the child, and of his ability to supply them, and when no express authority has been given, it devolves upon the party furnishing the same to show the parent's neglect or refusal to provide for the wants of the child.

3. **AGENTS**—*Special Agents—Their Authority.*—A special agent is one authorized to do a specific act in respect to which his power is limited, and a party dealing with him is bound at his peril to ascertain the extent of his authority.

4. **SAME**—*Authority of a Special Agent to Bind his Principal.*—Where a parent sent his minor child to a particular dentist to have work done at his expense, and the child went to another dentist and had the work done, it was held, that the child was a special agent of the parent and that the dentist who did the work could not recover.

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Assumpsit, for services. Appeal from the City Court of Elgin; the Hon. R. P. GOODWIN, Judge, presiding. Heard in this court at the May term, 1896. Reversed. Opinion filed December 9, 1896.

IRWIN & EGAN, attorneys for appellant.

A. G. WAITE, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was an action by appellee to recover \$19 from appellant for dental work done for appellant's minor daughter; there was a recovery for \$19, the amount of appellee's bill.

It is not disputed that the dental work was done, or that the charges are reasonable, but the payment is resisted solely on the ground that the work was done without the express or implied promise of appellant to pay for it.

The facts, as disclosed by the record, are that appellant's daughter Blanche, then sixteen years old, told her father that her teeth needed dental work, whereupon he told her to go to a Dr. Whedon, appellant's family dentist, living at Elgin, and have him examine her teeth, and make an estimate of the price of the work. This she did, and reported back that the cost as estimated by Whedon would be \$10. He then told her she could have Whedon do it. A few weeks afterward she, instead of going to Whedon, went to appellee, who did the work and charged \$19 for it. Appellant knew nothing of appellee's doing the work until the statement was sent him.

In our opinion appellee has no ground for recovery against appellant. The services were performed without the knowledge or consent of appellant at a time when his daughter was residing at home, and when her father was ready and willing to provide all things necessary to her care and comfort.

When a person furnishes necessities to a minor without authority from the parent, he does so at his peril, and in order to recover from the parent he must show either an express authority or circumstances from which such author-

David v. Correll.

ity may be implied. The parent is to be the judge of the wants of the child and of his ability to supply them, and where no express authority has been given it devolves upon the party suing to show the parent's neglect or refusal to provide for the child's wants. *Hunt v. Thompson*, 3 Scam. 179; *Gotts v. Clark*, 78 Ill. 229; *McMillan v. Lee*, 78 Ill. 443; *Schmickle v. Bierman*, 89 Ill. 454; *Clark v. Gotts*, 1 App. 454; *Allen v. Jacobi*, 14 App. 277.

It is contended by counsel for appellee that, as appellant gave authority to his daughter to have dental work performed on her teeth, an application of the doctrine of agency makes him liable. It is insisted that the permission, thus delegated, clothed her with such apparent authority as to render him liable, although she acted contrary to his private instructions.

In this contention counsel loses sight of the distinction between general and special agencies.

The agency in this case was special, viz., to have the work done by Dr. Whedon. A special agent is one authorized to do a specific act in respect to which his power is limited. A party dealing with him is bound, at his peril, to ascertain the extent of his authority. *Anson on Contracts*, 345; *Doan et al. v. Duncan*, 17 Ill. 272; *Peabody v. Hoard*, 46 Ill. 242; *Baxter v. Lamont*, 60 Ill. 237.

Inasmuch as we are of the opinion that appellee is not entitled to recover from appellant on the facts, the judgment is reversed, but the cause not remanded.

William David v. Adam Correll.

68	123
74	47

1. **CUTTING TIMBER**—*Plaintiff Must Show Ownership in Fee*.—In an action of debt to recover the statutory penalty for cutting timber, under section 5, chapter 126, R. S., without proof of ownership in fee, the plaintiff can not recover.

Debt, for cutting timber. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 9, 1896.

POTTER & SMITH, attorneys for appellant.

H. L. RICHARDSON, attorney for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellee brought an action of debt against appellant to recover the statutory penalty for cutting timber, pursuant to Sec. 5, Chap. 136, 2 Starr & Curtis' Stat., 2388.

There was a verdict and judgment below for \$100 and costs.

Appellant prosecutes this appeal and insists upon a reversal, because,

1. The appellee failed to prove that he was the owner in fee of the land on which the timber was cut.

2. Because the evidence did not show that appellant cut the timber knowingly and willfully, and

3. Because it is claimed the appellant and his grantors had been in the open and adverse possession for more than twenty years prior to the cutting of the timber complained of.

We think the appellee failed to establish title in fee to the *locus in quo*. He did not attempt to show a connected chain of title from the government, but undertook to prove ownership by certain conveyances to himself and possession for a number of years; also by possession and payment of taxes for seven consecutive years under color of title. We think he failed to show possession of the strip in controversy, from which the timber was cut. On the contrary, the evidence tended strongly to show that appellant and his grantors had been in possession of said strip for more than twenty years prior to the commencement of the suit. Without proof of ownership in fee, appellee could not recover under this statute. *Wright v. Bennett*, 3 Scam. 258; *Whiteside et ux. v. Divers*, 4 Scam. 336; *Behymer v. Odell*, 31 Ill. App. 350.

The matter of good faith on the part of appellant in cutting the timber, and whether in doing so he acted knowingly and willfully, were questions for the jury. But for the failure to prove ownership in fee by appellee, the judgment must be reversed and the cause remanded.

**Grand Lodge of Illinois, Independent Order of Mutual
Aid, v. Catharine Wieting.**

68	125
108	408
68	135
78	164
68	125
108	\$588

1. **LIFE INSURANCE**—*When Suicide Does Not Avoid the Policy.*—The term suicide implies an act of self-destruction, deliberately done by a person capable of forming a legal intention, and when one kills himself while insane, even though he intends that the result of the act shall be fatal, but through the impairment of the reasoning faculties is not able to understand the moral character, nature, consequences and effect of such act, or is impelled by an irresistible impulse which he can not withstand, such act is not suicide within the legal sense of the term, and is not within the contemplation of the parties to a contract of life insurance, and in such a case the insurer is liable.

2. **PRACTICE**—*Examination of Jurors.*—A party can not complain that the trial court erred in refusing to permit jurors to answer certain questions propounded to them by him, when the record does not show that he exhausted his peremptory challenges.

3. **SAME**—*Objections Must be Specific.*—Objections to testimony should be specifically stated to the trial court and only such objections as are so stated can be considered on appeal.

4. **EVIDENCE**—*Verdict of the Coroner's Jury.*—In an action against a life insurance company, the verdict of the coroner's jury that the insured "killed himself while temporarily insane," is properly admitted as evidence on behalf of the plaintiff.

Assumpsit, on a beneficiary certificate. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

JOHN P. AHRENS, attorney for appellant.

JACK & TICHENOR, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit commenced by appellee against appellant, upon a beneficiary certificate issued by appellant to William Wieting, in favor of his wife, the appellee, herein. There have been two trials of the cause, the first resulting in a disagreement of the jury, but upon

the second, appellee obtained a verdict for \$2,072.22, and a motion for a new trial being overruled, judgment was entered on the verdict.

Appellant prosecutes this appeal and assigns many errors.

The beneficiary certificate contained the following clause : "Provided, however, that should the said William Wieting commit suicide, then, and in that case, only the amount paid by the said William Wieting into the beneficiary fund by virtue thereof, shall be paid to the beneficiaries above mentioned, which said amount shall be in full of all demands whatsoever arising out of or under this beneficiary certificate."

The insured paid into the beneficiary fund of the society \$26.25, and on September 24, 1894, hung himself in his father's barn, and thus came to his death. On the part of appellant it is contended that the insured committed suicide, and thus avoided the certificate as to the payment of anything except the amount contributed to the beneficiary fund as above stated. On the other hand it is insisted by appellee, that the act of William Wieting in taking his own life was an insane act, and therefore not a suicide within the meaning of the certificate.

It will be observed that the provision above quoted from the beneficiary certificate, contains no limitations or qualifications as to the character or effect of the suicide, as do some policies of life insurance, such as that the policy shall be void if the insured "commits suicide, whether sane or insane," and hence the term is to be taken according to its legal definition and acceptance, to wit, "The act of malicious self-murder." 2 Bouv. Law Dict., title, Suicide.

The great weight of authority in this country undoubtedly is, that the term suicide implies an act of self-destruction deliberately done by a person capable of forming a legal intention; and that when one kills himself while insane, even though he intends that the result of the act shall be fatal, but through the impairment of the reasoning faculties is not able to understand the moral character, nature, consequences and effect of such act, or is impelled by an

irresistible impulse which he can not withstand, such act is not a suicide within the legal sense of the term, and is not within the contemplation of the parties to a contract of life insurance, and in such case the insurer would be liable. *Mutual Life Ins. Co. of N. Y. v. Terry*, 15 Wall. 580; *Breasted et al., Admrs., etc., v. Farmers L. & T. Co.*, 4 Hill, 73; *Schultz v. Insurance Co.*, 40 O. St. 217; *Conn. Mut. Life Ins. Co. v. Akens*, 150 U. S. 468.

It is true there is an irreconcilable conflict among the courts of this country upon this question, some following the English doctrine, which seems to be that when one commits an act of self-destruction, it is immaterial that he was impelled thereto by reason of insanity which impaired his sense of moral responsibility and rendered him, to a certain extent, irresponsible for his actions. *Bowadale v. Hunter*, 5 Mann. & Gr. 639; 2 *Bigelow L. & A. Ins. R.* 280; *Clift v. Schwabe*, 3 Conn. B. 437; 2 *Bigelow L. & A. Ins. R.* 312.

This appears also to be the doctrine held by the courts of Massachusetts. *Dean v. Am. Mu. L. Ins. Co.*, 4 Allen, 96; *Cooper, Admx., v. Mass. Mu. L. Ins. Co.*, 102 Mass. 227.

But the rule first above stated, and now known as the American doctrine, appears to be sustained by the great weight of authority in this country, and may be regarded as the settled rule in most of the States of the Union. *Bacon on Benefit Societies*, Sec. 334.

And such is the rule followed by the courts of this State so far as the question has come before them for consideration. *Lawrence v. Mu. L. Ins. Co. of N. Y.*, 5 Ill. App. 280; *Suppiger v. Covenant Mu. Ben. Assn.*, 20 Ill. App. 595; *New Home Life Assn. v. Hagler et al.*, 29 Ill. App. 437.

In the case at bar a large amount of testimony was taken upon the trial, touching upon the mental condition of the insured at the time he committed the fatal act of self-destruction, a careful examination of which leads us to the conclusion that the verdict of the jury was warranted by the evidence, and we have no disposition to disturb their finding, that the deceased was insane and mentally and morally irresponsible at the time of his death.

We do not deem it necessary to go into an extended discussion of the evidence, although it has been elaborately argued by counsel upon both sides of the case. Being of the opinion it was sufficient to support the verdict, we will content ourselves with so holding so far as that branch of the case is concerned.

The application of said William Wieting for membership in the order was dated July 11, 1893, and contained the following clause: "I hereby most solemnly promise that I have made or will make to the medical examiner of your lodge, full and complete statements of the nature and duration of all ailments that now impair or have at any time impaired my life or health. I also agree that should I commit suicide, then, and in that case, only the amount paid by me into the Mutual Aid Fund on my certificate shall be paid to the beneficiaries mentioned in my beneficiary certificate. * * * I further agree and contract that the answers I shall make to the questions propounded by the medical examiner, as shown by the medical examiner's blank hereto attached, shall be the truth, and I agree that they shall form the basis of my contract with the said Grand Lodge of Illinois Independent Order of Mutual Aid."

Attached to the application was the medical examiner's blank therein referred to, and in such blank the insured was asked and required to answer whether he had, or ever had, among other diseases, habitual headache or sunstroke, to each of which questions said William Wieting answered "No." It is insisted by appellant that this answer of the insured was false, and that the misrepresentation being material to the risk, avoided the certificate. We think the question as to whether or not this representation was false, was fairly submitted to the jury, and they having found against appellant upon that point, we are content with their finding, as the evidence bearing upon that question is, at best, unsatisfactory. It is a very different case to that of *Supreme Council Royal Arcanum v. Lund*, 25 Ill. App. 492, cited by counsel for appellant, where there could be no question, upon the evidence, that the representations were false,

and of such a nature as ought to avoid the policy of insurance. About the only evidence there is in this case as to the deceased ever having had a sunstroke or habitual headaches, came from appellee on her cross-examination, the substance of which is that her husband told her he had a sunstroke and severe headache long before they were married. But so far as her own knowledge goes, she swears the first headache she ever knew him to have was in the fall of 1893, long after the date of his application for membership in appellant's society. The burden of showing that the representations were false was upon appellant, and we think the jury were justified in finding that the defense based upon that claim was not proven.

It is insisted that the court erred in refusing to permit the jurors to answer certain questions propounded to them by appellant. The following is a sample of the questions, viz.:

"If a man takes his own life, is it your opinion that that of itself shows that the man is insane?"

The court sustained an objection to the question, made by appellee, and in passing upon the question said, "I think as far as I ought to allow you to go, is to ask whether the act of self-destruction would create any prejudice in the mind of the juror so as to disqualify him from a fair consideration of all the evidence in the case and a fair trial of the case under the instructions of the court."

We see no impropriety in this action of the court. Nor do we think it would have been error to allow the questions to be answered. But in any event, inasmuch as the record does not show that appellant exhausted its peremptory challenges, it is in no position to complain now that it did not have a fair trial on that account.

It is also urged that the court erred in allowing to be answered a certain question of a hypothetical character, put to the medical expert introduced on behalf of appellee, it being claimed it was not warranted by the evidence. The question was objected to by appellant as "informal, and not applicable to this case as shown by the evidence." No attempt was made to point out specifically wherein the facts assumed

were not proven by the evidence or legitimately inferable from the evidence. In order to avail of an objection to a hypothetical question on the ground that it is not warranted by the evidence, we think the attention of the trial judge should be called specifically to the point relied on, in order that he may determine, as he must in the first instance, whether there is sufficient evidence tending to prove the facts stated, to authorize the question. Rogers on Expert Testimony, p. 67.

The rule is a general one, that objections to testimony should be specifically stated to the trial court, and that only such objections as are so stated can be considered on appeal. *Ib.*; Louisville, etc., R. R. Co. v. Falvey, 104 Ind. 409.

In cases involving an inquiry as to the sanity or insanity of another, considerable latitude is almost necessarily allowed in the framing of hypothetical questions to medical experts. Whether or not the supposed facts set forth in the hypothesis are proven, is always in the end a question for the jury under the instructions of the court. We are of the opinion there was no error in permitting the question to be answered.

The court refused to allow the witness, Frantz Taylor, to testify as to the mental condition of the deceased on the ground that the witness had not shown sufficient knowledge upon the subject to enable him to do so. Even if this was error it was not sufficiently serious to require a reversal of the judgment for that cause. The witness showed such a slight knowledge of the deceased in his lifetime, that his testimony could have had but little weight with the jury if admitted.

It is also insisted the court erred in admitting in evidence the verdict of the coroner's jury, finding that Wieting killed himself while temporarily insane. In the case of United States Life Ins. Co. v. Vocke, 129 Ill. 557, it was held that the evidence was proper. Counsel for appellant attempt to draw a distinction between that case and this, on the ground that there the verdict was offered against the plaintiff, while here it was admitted in her favor. We can see no difference

Brassel v. Troxel.

in principle. The point of the Supreme Court's decision in the case cited was, that by force of the statute the coroner's inquest became a public record, and was thereby made competent evidence in any subsequent judicial inquiry upon the same subject, as tending to prove the facts found to be true on the face of the record. We can perceive no reason why, if the verdict would be admissible against the plaintiff, it should not be receivable in her favor. We hold there was no error in admitting the verdict as evidence in the cause.

We find no serious error on the part of the court in giving, refusing or modifying instructions. The jury seem to have been fully and fairly instructed as to the law of the case, according to the American doctrine as to what class of suicides will avoid a policy of life insurance, and we think appellant has no cause to complain that the court did not instruct as strongly in its favor as it was entitled to.

There being no substantial error in the record, the judgment will be affirmed.

Michael Brassel v. Fred Troxel et al., for use, etc.

68 131
68 367

1. *CHOSSES IN ACTION—Assignment of.*—Choses in action may be assigned, and courts of law will recognize and protect the rights of the assignee, whether the assignment be good at law or in equity only.

2. *CONTRACTS—Insolvency of Parties to.*—A contract remains binding notwithstanding the insolvency of one of the parties, so long as such party is able and willing to perform on his part.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Iroquois County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

C. H. PAYSON and NELLY B. KESSLER, attorneys for appellant.

FRED P. MORRIS and FRANK L. HOOPER, attorneys for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This suit was by appellees, Troxel and Hari, for the use of Wanzer & Co., originally commenced before a justice of the peace, and on appeal to the Circuit Court it was tried by the court without a jury and there was finding and judgment for the appellee for one hundred and twenty dollars.

The cause of action was based on a contract entered into between appellant and appellees, Troxel and Hari, July 24, 1894, whereby the appellant agreed to deliver to the appellees, at their elevator at Cissna Park, twelve hundred bushels of corn at the price of forty cents per bushel during the month of August of the same year.

The contract was first assigned by appellees to Jacob Kropp, August 22, 1894, and then by him and Troxel and Hari to Wanzer & Co.

Arrangements were made by appellees with each of them, to receive and pay for the corn when delivered.

Troxel and Hari became insolvent August 22, 1894, and up to that time, the evidence tends to show, were ready, able and willing to receive and pay for the corn at any time that it might have been delivered.

The assignment was then made to Kropp as above stated, and on the 24th of August he, or Troxel and Hari, assigned the contract to Wanzer & Co.

The evidence further tends to show that the respective assignees of the contract, during the time they held it, were ready, able and willing to receive and pay for the corn at the contract price, had it been delivered.

It is insisted by appellant that the respective assignments above named were not made upon any of those considerations which enter into legitimate business transactions, and were made without consideration, and, in fact, that the contracts were not assignable, and that there was no mutuality between the appellant and the assignees for the reason that the latter were not bound to take the corn.

We are of the opinion that these contentions can not be maintained on the part of the appellant.

In the first place the evidence tends to show that there

Brassel v. Troxel.

was a valuable consideration for the assignments, and in the next place it is not a matter that very much concerned the appellant so long as the appellees and their respective assignees were ready, able and willing to receive the corn according to the contract, and pay for it on delivery.

The law recognizes the right of an assignment in a chose in action, and formerly at common law an assignment was prohibited "and the doctrine of equitable assignment has been gradually extended to meet the convenience of trade and business, and has been favorably viewed in the courts of law, subject, however, to the legal principle that in such cases the assignee can enforce his claim only in the name of the assignor, unless there has been an express promise by the debtor to pay the assignee. Under this limitation choses in action generally may be the subject of an assignment, and debts which are contingent, and money yet to become due, may well be assigned, these circumstances only operating to postpone the liability of the debtor until the contingency happens and the money becomes payable." Vol. 1 Waite's Act. and Def., 356, and cases cited.

In this case there was no question of personal trust between appellant and Troxel and Hari, for the assignee could as well receive the corn and pay for it as the appellees. In one sense they may be regarded as the agents of the latter to fulfill their part of the contract by receiving and paying for the corn, the liability all the time remaining on the part of the appellees to fulfill the contract according to its terms, as they had not been released by the appellant.

The rights of the assignees will be protected by the courts. *Savage v. Gregg*, 150 Ill. 167.

Another point made is, that the appellant was released from the obligation of his contract with Troxel and Hari, by reason of the fact that the latter had become insolvent.

We do not understand this to be the law.

The contract remains binding, notwithstanding the insolvency of one or both of the parties, so long as they are able and willing to perform on their part.

A party may protect himself against the insolvency of

the other party by taking security for its performance on his part, but the contract does not lack mutuality because one of the parties might be unable to pay damages for failure to perform on his part.

The liability of the insolvent is the same to pay damages, notwithstanding they might not be collectible on execution.

The appellant failed to deliver the corn according to the contract, and the evidence shows that appellees and their respective assignees were able, ready and willing at all times during the month of August, when the corn was to have been delivered, to receive and pay for it; and it further shows that corn was worth ten cents a bushel more at the expiration of the time when it should have been delivered than the contract price.

The finding and judgment of the Circuit Court was, therefore, correct.

Seeing no error in the record, the judgment of the Circuit Court is affirmed.

Henry G. Kuck v. John U. Fulfs.

1. **SETTLEMENT—How far Conclusive.**—When a settlement is relied upon, parol evidence is admissible to prove that some item was omitted either by fraud, accident or mistake, even though the settlement be evidenced by a written agreement.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Woodford County; the Hon. NATHANIEL W. GREEN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

WINSLOW EVANS, attorney for appellant.

THOMAS KENNEDY and JAMES A. RIELY, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit upon a promissory note

William Deering & Co. v. Dohlman.

for \$250, dated October 10, 1888, executed by appellant to appellee. Upon the first trial of the cause by a jury appellee recovered a verdict for \$347.45. A motion for a new trial being granted, the cause was again tried by a jury, resulting in a verdict for appellee for \$357.20. The court overruled a motion for a new trial and rendered judgment on the verdict. The defense was based on an alleged settlement, in writing, which was introduced in evidence, and the controversy is over the question as to whether or not this note was included in the settlement. Appellant claims that it was, but appellee insists that it was not. It is urged as grounds of reversal that the court erred in admitting parol evidence upon this question, it being insisted that the instrument in writing containing the settlement is broad enough in its terms to show that the note was included. We think the court did not err in admitting the evidence. Where a settlement is relied upon, we understand it is always competent to show that some item was omitted, either by fraud, accident or mistake, and it is permissible to resort to parol testimony to show the fact. The terms of the settlement itself were somewhat ambiguous and may or may not have been intended to include the note. The only witnesses testifying upon the subject were appellant and appellee, and they squarely contradict each other as to whether the note was included in the settlement or not. It was for the jury to determine, if possible, which told the truth, and two juries having found for appellee, we see no reason for disturbing the verdict. Finding no serious error in the action of the court in admitting evidence, or the giving or refusing of instructions, the judgment will be affirmed.

William Deering & Co. v. William Dohlman.

1. INSTRUCTIONS—*When Errors in, Not Ground for Reversal.*—The fact that some of the instructions given in a trial are subject to criticism because not based on the evidence, is not ground for reversal, if on the undisputed evidence the verdict and judgment are just.

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William Deering & Co. v. Dohlman.

Transcript, from a justice of the peace. Error to the Circuit Court of Livingston County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

SNOW & HINEBAUGH, attorneys for plaintiffs in error; A. C. BALL, of counsel.

B. F. JONES and E. P. HOLLY, attorneys for defendant in error.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit brought by plaintiffs in error to recover of the defendant in error on a promissory note given by the latter to the former for the sum of \$20, dated June 23, A. D. 1890, payable at the Pontiac National Bank on or before October 1, 1891, with interest at the rate of eight per cent per annum. The note was taken by the firm of Capes & Moore, agents of Wm. Deering & Co., pursuant to a certain commission contract introduced in evidence.

At the date of the note defendants in error purchased a mower of plaintiff in error through their agents, Capes & Moore, at Pontiac, Illinois, for \$45, and as part payment gave the note in question. The agreement was that defendant in error was to pay all for the machine October 1st, after the date of the note, if he wished. He did in fact pay \$20 cash and gave a note for the rest, or \$20 of it. He paid \$20 cash September 4, 1890, and when he went to make payment of the rest he saw Capes and told him he wanted to pay the note, and Capes said all right, and he laid out \$25 and asked him for the note, when Capes told him that the note was in Morrow's bank, and to go and get it. When he applied to the bank Morrow told him he had not the note and never had it. Then he returned to Capes and Capes said he had lost it, and then, October 1st, made out and gave defendant in error a receipt against the note signed by Capes & Moore.

He also paid \$20 to Moore September 4, 1890, and took the receipt of Capes & Moore; both receipts were against the mower "note."

The note was not due, and defendant in error knew it, but he had an understanding with Capes & Moore, that he might pay it any time before due. The money was paid before defendant in error went to the bank. The money was paid before Capes & Moore had settled with plaintiffs in error. The first payment of money was sent to plaintiffs in error by Capes & Moore, as Capes testified.

Capes & Moore left notes at Morrow's bank at times but not at plaintiffs in error's, and this note was sent by plaintiffs in error to Morrow's bank for collection in July or August, 1891, the next year after Capes & Moore had collected it.

The evidence tended to show that Capes & Moore did not leave defendant in error's note at the bank but that it came direct from plaintiffs in error.

The only question in the case is as to whether Capes & Moore had authority to collect for the machines for the sale of which they were agents.

The note in question was dated September 23, 1890, and paid to Capes & Moore October 1, 1890, while actually in their possession, as the evidence tended clearly to show, but at the time not produced, either intentionally, or because it could not at the time be found.

The settlement of Capes & Moore was not made with Deering & Co. till about the middle of October, and at that time the note supposedly sent to them, though it had been paid while they held it. It seems that these agents, Capes & Moore, were not honest, and were in the habit of collecting plaintiffs in error's notes and pretending they could not find them, as was done in the case of the witness William Holman, and defendant in error—the notes afterward turning up against the makers in the hands of plaintiffs in error.

It seems that the agency of Capes & Moore was a general one, to sell machines and receive cash for them, or part cash and part notes, as they thought proper. And it was their custom to do so and to receive payment on notes after given, especially before they were turned over to plaintiffs in error; they were not bound then to take notes.

We think they had ample authority to collect notes, especially before they were turned over to plaintiffs in error on settlement and the makers notified thereof.

The agency was in its notice general, and more especially as respected the public, dealing with them.

By their very employment by plaintiffs in error, and in allowing their agents to sell and collect, they were held out to the public as being honest, and if any one should suffer on account of their dishonesty it should be plaintiffs in error, rather than the public. *Howe Machine Company v. Ballwig*, 89 Ill. 318.

The agents, Capes & Moore, by the terms of their agency in writing, could sell for cash as well as for money, and they sold to defendant in error with privilege of his paying all by October 1, 1890, and this he did in presence of the contract.

The instructions given for defendant in error are complained of by counsel for plaintiffs in error. We have examined them and find them as a general rule correct.

We do not think that the jury could have been misled, but even if some of the instructions are subject to criticism, because not based on the evidence, it would not be ground for reversal, as on the undisputed evidence the verdict and judgment is just.

The judgment of the Circuit Court is therefore affirmed.

John Ward v. The People of the State of Illinois.

1. VERDICTS—*When Conclusive*.—The mere fact that upon the evidence as it appears in the record a court of appeal might, in the first instance, have been disposed to form a different conclusion than that arrived at by the jury who tried the case, is not sufficient ground for reversal.

Bastardy.—Appeal from the County Court of Will County; the Hon. A. O. MARSHALL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

Alexander v. Boyle.

MEARS & DOWNEY, attorneys for appellant.

E. C. AKIN, State's Attorney, for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was a prosecution for bastardy. There was a trial by jury, a verdict of guilty, and that appellant was the father of the bastard child. A motion for new trial was overruled and judgment entered against appellant, according to the statute in such cases.

It is insisted the verdict is against the weight of the evidence. While it may be conceded there is much in the evidence which tends to weaken the prosecution, yet the jury saw the witnesses and heard them testify, and the trial judge, with the same opportunities, refused a new trial, so that, even though upon the evidence as it appears in the record, we might, in the first instance, have been disposed to find the other way, we can not say the jury were not warranted in finding the appellant guilty. In the absence of manifest error in the record, we do not feel authorized to reverse the judgment.

A careful examination of the record shows it to be substantially free from error, either in admitting or rejecting evidence, or the giving or refusing instructions, and the judgment will therefore be affirmed.

John Alexander v. Hugh Boyle.

1. **DEMAND FOR POSSESSION**—*Ground of Refusal to Comply with, Must Not be Stated Untruly.*—Where demand is made upon a party for the delivery of property, he must act in good faith, and put his refusal upon the true ground which he expects to rely upon. He can not make one excuse when the demand is made, and when the suit is brought, defend on another and different ground.

2. **REPLEVIN**—*Proof of Insolent Conduct by Plaintiff Inadmissible.*—In a replevin suit it is proper to refuse to allow the defendant to prove

that the plaintiff insolently demanded the property and caused the arrest of the defendant for stealing it. There is no issue in such a case to which such evidence would be at all pertinent.

Replevin, for a wagon. Appeal from the City Court of Aurora; the Hon. R. P. GOODWIN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

N. J. ALDRICH, F. D. WINSLOW and WM. GEORGE, attorneys for appellant; THEODORE WORCESTER, of counsel.

ALSCHULER & MURPHY, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of replevin for a wagon. Verdict for appellee for \$30 damages, and judgment on the verdict.

There seems to be no dispute about the fact that appellee was the owner of the wagon in question, nor that it was stolen from him in Chicago, taken to Aurora, and bought by appellant, who was the secretary and treasurer of the Alexander Lumber Company, a corporation doing business in Aurora, and of whose affairs there, appellant appears to have had general charge.

The contention of appellant is that in purchasing the wagon he was acting for the Alexander Lumber Company, whose money paid for it, and that the only possession he ever had of the property was as an agent or servant of the company. It is therefore insisted that the demand for possession should have been made upon the company, and suit brought against it, and not against appellant in his individual capacity. On the other hand, it is claimed, and the proofs seem to show, that when appellee found his wagon at the yards of the Alexander Lumber Company, he told appellant it was his property and he wanted it, but that appellant informed appellee that he, appellant, had bought the wagon and he would keep it; that appellant refused to surrender the possession of the wagon, saying it was his wagon and he would keep it; telling appellee he "might

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take law proceedings, or do what he had a mind to, but he (appellant) would not give up the wagon." Appellant does not deny having made these statements, but insists that appellee could not have been deceived by them, or led to understand that appellant was claiming the wagon as his individual property, but that, from all the circumstances and surroundings, appellee must have understood that appellant was speaking for the company, and not for himself.

It is not disputed, as a general proposition, that when the right to possession of personal property is in controversy, the demand for and suit to recover it must be made of and brought against the party who has the possession, nor that, as a general rule, replevin will not lie against a servant for property in his actual possession belonging to the master, but which the former holds merely as a servant, unless he is guilty of some wrongful act.

But in this case we think the conduct of appellant when the demand was made upon him, was such as to estop him from now setting up the defense relied upon. Where demand is made upon a party for the delivery of property, he must act in good faith, and put his refusal upon the true ground which he expects to rely upon at the trial. He can not make one excuse when the demand is made, and when the suit is brought, defend on another and different ground. Wells on Replevin, 275, 380, 381; Ingalls v. Buckley, 15 Ill. 224; Udell et al. v. Slocum, 56 Ill. App. 216.

The authorities on this question are numerous and uniform.

The court committed no error in refusing the evidence offered by appellant to show that appellee insolently demanded the property and caused the arrest of appellant upon a criminal charge for the theft of the wagon. There was no issue in the case to which such evidence would be at all pertinent. No instructions were given for appellee and the only one refused for appellant would have directed a verdict in his favor. It was properly refused.

We find no error in the record and the judgment will be affirmed.

William H. Bartlett et al. v. Charles E. Wilcox et al.

1. **PARTNERSHIP**—*Admissions by an Alleged Partner.*—The existence of a partnership must first be established before the statements and admissions of one of the parties to the supposed partnership can be heard in evidence against his alleged partners.

Assumpsit, on a special contract. Appeal from the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

ROBERT DOYLE and W. T. PANKEY, attorneys for appellants.

FREE P. MORRIS and FRANK L. HOOPER, attorneys for appellees.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellants, partners in the grain business at Terre Haute, Indiana, against Charles E. Wilcox, Chas. M. Dazey and Chas. L. Dazey, appellees, to recover amount due appellants on certain seed oats contracts alleged to have been purchased of them by Wilcox, acting for appellees as a firm.

A trial by jury was had upon pleas of the general issue and sworn pleas denying joint liability, which resulted in a verdict for appellees, and a judgment against appellants for costs.

The following are the facts as disclosed by the record: January 9, 1891, Wilcox entered into a written agreement for one year to buy grain for appellants at Milford Station, Ill. By this agreement appellants were to advance money as required for buying grain, and Wilcox was to turn over to them all grain purchased at certain stipulated commissions.

Afterward a supplemental contract was entered into

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whereby Wilcox was to let farmers in the vicinity have seed oats for the season of 1891, and take from them obligations to pay for the same with interest at eight per cent, and to sell to Wilcox all the oats marketed by them that year. A large amount of seed oats were sold in this way and many such obligations taken, and a considerable amount of other business in the grain line done by Wilcox for appellants.

On January 25, 1892, Wilcox had a settlement with appellants at Terra Haute, in which they went over their accounts, and, Wilcox representing that he and the Dazeys were partners, a proposition was made by appellants to sell appellee the seed oats contracts. Wilcox expressed a willingness on his part to purchase, but deferred accepting until he should return home and consult with the Dazeys. On January 26th he wrote appellants that they would take the contracts without the interest.

The verdict of the jury was right, under the issue denying joint liability. Where the existence of a partnership is made an issue by sworn pleadings, and has not been established as regards a transaction, the statement of one of two or more defendants can not be heard to bind his co defendant. *Degan v. Singer*, 41 Ill. 28; *Hahn v. St. Clair Savings & Ins. Co.*, 50 Ill. 456; *Montgomery et al. v. Black et al.*, 124 Ill. 63.

The existence of such partnership must first be established before the statements and admissions of one of the parties can be heard in evidence as against all.

The proof in this case was clearly sufficient to establish a partnership relation between Wilcox and Charles L. Dazey, but not to show that Charles M. Dazey was a partner.

In this form of action and under the pleadings upon which the issues were submitted to the jury, there could not be a finding against part and for part of the defendants.

There was no error in refusing certain instructions offered by the plaintiff.

Judgment affirmed.

**Chicago, Burlington & Quincy Railroad Company v.
Lillie Libey, Adm'r, etc.**

1. **JURIES**—*Have no Right to Theorize.*—A jury has no right to theorize on either side of a case, but the parties must establish by evidence the respective theories advanced by them, if necessary to maintain their cause.

2. **NEGLIGENCE**—*Recoveries for, Must be Based on the Negligence Declared on.*—In a suit for personal injuries, said to have been caused by the negligence of the defendant, a recovery must be based on the negligence charged in the declaration, and an instruction which leaves the jury at liberty to find that such injuries were the result of any fault or negligence of the defendant, whether charged in the declaration or not, is bad.

3. **VERDICTS**—*Belief of Jury Must be Based on the Evidence.*—An instruction which tells a jury that if they believe certain facts they should find accordingly, is bad. The belief upon which a jury is authorized to act must be based upon the evidence.

4. **INSTRUCTIONS**—*Should Not Assume Facts.*—Instructions should not assume facts which are in dispute.

5. **SAME**—*Must Apply to the Evidence.*—Even though an instruction may contain a correct proposition of law, it should not be given unless it applies to the evidence.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Knox County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 9, 1896.

WILLIAMS, LAWRENCE & WILLIAMS, attorneys for appellant; O. F. PRICE, of counsel.

CHARLES S. HARRIS, EDWARD J. KING and J. A. MCKENZIE, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by appellee, as administratrix of the estate of her husband, Moses Libey, deceased, to recover damages for his death while in the service of appellant as a brakeman on one of its freight trains. There was a verdict and judgment for appellee for \$3,000, and appellant brings the case here by appeal.

The negligence charged in the declaration is, that appellant "suffered and allowed an iron spout or conduit to remain and be in an improper and too nearly horizontal position, so that the same extended out and over the top of defendant's train, and that but a few feet intervened between the said spout and the top of the cars; and that said defendant, when said spout or conduit was placed in said position, wrongfully, negligently and carelessly caused a locomotive and train of cars to be driven along on said main track at and in close proximity to said water tank and spout, and that by means of the premises, and by reason of the wrongfulness, carelessness and improper manner aforesaid, the said Moses Libey was then and there struck with great force and violence by the said water spout or conduit, and was then and there, by means thereof, hurled with great force and violence from and off said freight train to and upon the ground, and was thereby then and there killed." The declaration contains the usual averments as to due care on the part of the deceased.

The facts, as shown by the evidence, are substantially as follows:

Moses Libey, the deceased, was a brakeman on one of appellant's freight trains, passing Plano at 3:25 on the morning of January 29, 1895. The railroad at that station runs nearly east and west, and on the south side of the track there was a water-tank for the purpose of supplying engines with water. Attached to this tank was a spout or conduit, about 13½ feet in length, and weighing some 160 pounds, retained in position away from the tank by a counterpoise weighing about 148 pounds. To use this pipe in conveying water into the tank of the tender, it was pulled down by means of a rope attached, and after using, the spout was lifted up until the counterpoise operated to restore it to almost a perpendicular position away from the track. The train on which deceased was braking did not stop in Plano on the trip when he was killed, and the last engine that took water at the tank in question was hauling train No. 92, which passed through Plano shortly after six

o'clock on the evening of January 28, 1895, some eight or nine hours before Libey's train passed the same point.

The deceased was last seen alive in the cupola of the caboose upon which he was riding, by the conductor of his train, just as the train was coming into Plano, and he then had his head resting sideways upon his shoulder, as if he might have been asleep. His absence from the cupola was not discovered until the train had run about three miles east of Plano, when the conductor missed him, but supposing he was elsewhere about the train, no search was made for him until they stopped at Aurora, fourteen miles from Plano. It being then ascertained with certainty that deceased was not on the train, a party with a switch engine and car were sent back over the road to search for him. He was found at Plano, at a point about 120 feet east of the water tank, and he was then in an unconscious and dying condition. He subsequently died from his injuries, never having regained consciousness. It was some two hours from the time his train passed through Plano until he was found.

The theory of appellee's case is that by reason of appellant's negligence, the water spout and its appliances became so clogged with ice that it would not remain in place, but dropped down to a somewhat horizontal position, and that when deceased, in the discharge of his duty, was riding on the top of the caboose, he came into collision with the spout, whereby he was knocked off the train and so injured as to cause his death. While this is the theory, there is no direct evidence to substantiate it. That it is possible the deceased came to his death in this way may be conceded, and yet another theory is equally possible. The evidence shows that the top of the caboose was icy and slippery, and it being the duty of deceased to give, from the rear car, what the witnesses call the "high ball" signal, or signal to go ahead without stopping, to the crew of the engine, the theory of appellant is, that in passing out upon the top of the caboose to give the signal, he slipped and fell, and thus was killed. As no one saw the deceased fall, there is no direct

evidence as to how he came from the caboose to the ground, and either theory is possibly correct. But mere theory is not sufficient to render the appellant liable; the charge of negligence must be proved as alleged. Only one witness testifies to seeing the spout out of position, and this was after deceased had been found injured, while quite a number of witnesses, having equal opportunities, testify to the contrary. The evidence shows that seven trains had passed the tank and spout in question from the time water was last taken therefrom at six o'clock the evening before, prior to the passing of the train on which deceased was employed, and the engineers and firemen of several of them testify that in passing they noticed the spout, and it was in its proper position. The evidence, we think, shows conclusively that if, after using, the spout were lifted up so that the counterpoise brought it to its proper position, it could not drop down again without some human agency, and if the witnesses who saw the spout in its proper position at various times through the night are to be believed (and we see no reason why they are not), then the spout, if dropped down as the one witness testifies to, must have been pulled down by some person; but as to whom it was, whether an employe of appellant or a stranger, there is no proof, nor is there any evidence that it was done through the negligence of appellant.

A careful examination of the evidence shows that it is a matter of serious question as to how the deceased came to his death. Under these circumstances it was a matter of great importance that the jury should be accurately instructed. There was no charge or claim in the declaration, nor was there any proof, that the spout in question, and its appliances, were "defectively constructed," and yet the second instruction given for plaintiff below tells the jury that if they "shall believe that Moses Libey came to his death by reason of a defectively constructed or placed water spout, as alleged in the declaration, and that such defect which caused his death was the result of fault or neglect and carelessness of the defendant," * * * they should find for the plaintiff, etc.

The vice of this instruction is that it submits to the jury an issue that was not in the case. Then, again, it assumes that the defective construction, or defective placing of the pipe caused the death; this was clearly improper. Instructions should not assume facts as being proven. The instruction was also faulty in giving the jury to understand that if they "believed" a certain fact, whether such belief was based upon the evidence or not, they were at liberty so to find.

The belief upon which a jury is authorized to act, must be based upon the evidence. In this case the jury may have believed that the deceased came to his death by reason of the pipe being out of its proper position, because that would seem to them a plausible theory, but they should not be told that they might so find unless such belief was sustained by the evidence.

The third instruction given for appellee is faulty, in that it does not confine the cause of death to the negligence charged in the declaration, but leaves the jury at liberty to find that such death was the result of any fault or negligence of appellant whatever, whether charged in the declaration or not, which was clearly improper. While the jury, from this instruction, were given the liberty of speculating or guessing as to the cause of death, yet they were told, in effect, that when it came to any matter of defense which might be set up by appellant, they had no right to guess, "unless such guess is the natural and proper conclusion to be drawn from the evidence." The jury have no right to guess on either side of a case. The plaintiff, as well as the defendant, must establish by evidence the respective theories advanced by them, if necessary to maintain their case. We think the instruction, as given, was erroneous and misleading.

The fourth instruction was clearly uncalled for and misleading, and was not warranted by any evidence in the case. So far as the matter of the probable negligence of a fellow-servant was concerned, it took the entire question from the jury. If the death of Libey was caused by the negligence

of a fellow-servant in the same line of employment, then the common master would not be liable, unless it had failed in its duty to exercise due care in the employment of such fellow-servant, and on this point there was not a particle of proof. And yet the jury were told by this instruction that Libey had a right to assume that appellant had exercised reasonable care in the selection of its employes; that he was not bound to investigate whether it had done so or not, and that until such time as notice to the contrary was brought home to him, he had a right to act on such assumption. Even though the instruction may contain a correct proposition of law, yet as applied to the evidence or the facts of this case, it should not have been given. Its practical effect was to neutralize every other instruction given upon the subject of fellow-servants, and absolutely cut out any defense based upon the theory that deceased came to his death through the negligence of a fellow-servant.

For these errors in the instructions, the judgment must be reversed and the cause remanded.

Reversed and remanded.

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**Atchison, T. and S. F. R. R. Co. v. John H. Alsdurf,
Adm., etc.**

1. **NEW TRIALS**—*The Statute in Regard to, Construed.*—The provision in the practice act that no more than two new trials upon the same grounds shall be granted to the same party in the same cause, applies only to trial courts and does not operate to restrict the power of courts of appeal to reverse judgments in the same case any number of times.

2. **VERDICTS**—*Against the Weight of the Evidence—Duty of a Court of Appeal.*—In a case where the verdict is clearly against the weight of the evidence, it is not only the right but the duty of a court of appeal, to reverse the judgment.

3. **EVIDENCE**—*Must Follow the Pleading—Absence of, can not be Supplied by Conjecture.*—In a suit against a railroad company for injuries caused by the defective condition of its track and rails, the plaintiff must prove by evidence the defective condition as described in the declaration and that such defect produced or caused the accident, and the absence of such proof can not be supplied by speculation and theory.

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A., T. & S. F. R. R. Co. v. Alsdurf.

Trespass on the Case.—Death from negligent act. Error to the Circuit Court of Grundy County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Reversed. Opinion filed December 9, 1896.

ROBERT DUNLAP, S. C. STOUGH and ELDON J. CASSODAY, attorneys for plaintiff in error; E. D. KENNA, of counsel.

E. S. CLOVER, attorney for defendant in error.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case to recover damages sustained by the widow and next of kin of Eugene C. Judd, deceased, who was a brakeman in the employ of plaintiff in error, and was killed while working about one of its trains of cars at Mason, Ill., on November 12, 1890. There was a trial by jury resulting in a verdict and judgment in favor of defendant in error for \$2,000.

The case has been before this court on two former occasions, and twice the judgment of the court below has been reversed. 47 Ill. App. 200; 56 Ill. App. 578.

The facts are substantially as stated in our first opinion as delivered by Justice Cartwright, with the exception noted by Justice Harker in the second opinion, viz.: It now appears that at the time that he came to his death deceased was on the same side of the train as the rear brakeman. It is unnecessary, therefore, to restate the facts, as the evidence upon the last trial was not materially different from what it was on the two former trials. On the last occasion when this case was before us, we reversed the judgment solely upon the ground that the verdict was against the evidence, and that is the principal reason now urged for a third reversal.

We feel constrained to hold that the point is well made and that the verdict upon the last trial is not warranted by the evidence. We are not unmindful of the fact that three juries have found the issues for defendant in error, upon substantially the same evidence, and it is insisted by his counsel that judgment in a cause will never be oftener than twice reversed, because the verdict is against the evidence.

We do not understand that there is any such rule of law. In the case of *Stanberry v. Moore*, 56 Ill. 472, it was held that the statute which provides that no more than two new trials shall be granted in the same case, has special application to suits in the Circuit Court, and does not operate to restrict the power of the Appellate Court in reversing judgments in the same case any number of times. And in that case a third verdict was set aside by the Supreme Court because it was not supported by the evidence. See also, *Wolbrecht v. Baumgarten*, 26 Ill. 291.

In the case of *Ill. Cent. R. R. Co. v. Patterson*, 93 Ill. 290, the same ruling was followed, and judgment based upon the verdict of a third jury was reversed, and the cause was not remanded.

In a case where the verdict is clearly against the weight of the evidence, it is not only our right, but our duty, to set it aside and reverse the judgment.

Upon the facts as shown by the evidence taken on the last trial, we see no reason for changing or modifying anything contained in our former opinions. It still remains that the cause of Judd's death is wholly a matter of speculation and conjecture. It may be that he stumbled and fell on account of the unballasted condition of the track; or it may be that his overalls caught upon a splinter in the rail and caused his fall. But this is mere theory, as to which there is no proof. Were this the only theory upon which the fall and death of the deceased could be reasonably based, we would not be inclined to reverse the judgment. But it is not; a number of theories may be set up which are equally as plausible, and just as liable to be the true one, as that relied upon by defendant in error. In the end he is obliged to say that the fall was caused either by the defective condition of the track, or the splinter on the rail, but which, he can not say, nor does the evidence disclose. It devolved upon defendant in error to prove, by evidence, the defective condition of the track and rails as described in the declaration, and also that such defect produced or caused the accident. The plaintiff's case must be proved as laid in

the declaration, and the absence of proof can not be supplied by speculation and theory.

In the case of *Phil. & Reading R. Co. v. Schertle*, 97 Pa. St. 450 (S. C., 2 Am. & Eng. R. C. 158), a brakeman was injured while attempting to couple a car to the tender of an engine, because, as alleged, the steps were imperfect in number and construction, and the spaces between the ties and sills were unfilled, so that the road bed was rough and uneven and full of pits and holes. In deciding the case the court say: "As to how he fell or the cause of his falling, there is not a word of evidence. The theory of the plaintiffs was that his falling was occasioned either by reason of the roughness or inequalities of the track, or in an attempt to get on the tank; the allegation being that the step was defective, and that he missed his footing because of such defect. It appeared that the track, at the particular point where the accident occurred, was in the course of being repaired; that it had been raised a few inches, and the space between the ties had not been ballasted or filled in. * * There was not, however, as before stated, a particle of proof that either the track or the step had anything to do with his death. For aught that appeared, he may have fallen in a fit, or from some cause wholly disconnected with either.

The case was submitted to the jury without evidence, and the verdict has no better foundation than a guess, or at most mere possibilities. This will not do."

To the same effect are the following cases: *Southern Pacific R. Co. v. Johnson*, 69 Fed. Rep. 559; *Manning v. C. & W. M. R. Co.*, 63 N. W. 312; *Sorensen v. Menasha Paper & Pulp Co.*, 56 Wis. 338.

Many other cases might be cited to the same effect, but we deem it unnecessary.

The language used by the courts in some of the cases above cited, is entirely applicable to the case at bar. As we said in a former opinion (56 App. 580), "No one saw him (the deceased) enter between the cars, and it is not known why he went there. He was found crushed and dead under the car. A proper inference from the proof is, that he was

killed by the wheels of the car, when propelled violently against him by the engine, caboose and coal car. But whether he caught in an iron sliver or rail and was tripped to the ground, stumbled over a projecting tie, or was knocked to the ground by the violence with which the car was propelled against him, is mere conjecture." Now if we go into the realms of conjecture we may suppose that deceased, in passing between the cars, stumbled and fell over the rail or was taken with a sudden vertigo or dizziness, and thus fell, or that he was from any other cause rendered incapable of taking proper care of himself at the moment; but, as we have seen, that will not do; to entitle the plaintiff to recover, he must not only show the negligence of the defendant, but that the negligence charged caused the injury. We think this has not been done in this case.

As was said in the case of *Sorensen, Adm'r, v. Menasha P. & P. Co., supra*: "From all that appears in the evidence, it was a mere accident and unaccountable."

We are still of the opinion, also, that the evidence entirely fails to show that deceased was in the exercise of due care for his own safety at the time he was killed.

No one saw him struck, nor was any one near him at the time of the accident. Under these circumstances it was proper to receive evidence concerning the character and habits of deceased as to the exercise of care for his own safety, and such testimony was introduced; one witness says "he was sober, active and very cautious in the discharge of his duties." While this may have been true of him in general, it seems to us that at the time of his death he showed such an utter disregard for his own safety as entirely precludes the right of recovery.

According to the theory of counsel for defendant in error, the deceased went between the cars either to couple them together or to ascertain whether they were already coupled. The night was dark, yet he set his lantern on the end of a tie and went between the cars, without any notice or signal to the engineer, who was operating the engine, or to the rear brakeman, who was controlling the movement of the engineer by signals to him, and in some manner got under

the wheels and was killed. Even though witnesses may swear that such action was according to the usual course and custom of doing that kind of work, it seems to us, as a matter of ordinary common sense, it was highly dangerous, and we fail to find in the evidence anything to show its necessity. Without unnecessarily extending the length of this opinion, we think the judgment must be reversed for the two reasons, that the evidence does not show that the alleged negligence complained of caused the injury, and that the deceased came to his death by his own want of due care. Inasmuch as the defendant in error, after three trials, has been unable to establish a cause of action upon the facts, the case will not be remanded.

FINDING OF FACTS TO BE MADE A PART OF THE JUDGMENT.

"We find that deceased came to his death from some accident the cause of which is not shown by the evidence.

That the deceased did not receive the injury which caused his death by any fault or negligence of the plaintiff in error.

We further find as a fact that the deceased was, at the time of his death, guilty of such a want of ordinary care for his own safety as to be responsible for his own death, and that but for such want of ordinary care he would not have been killed."

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The Village of Kewanee v. John H. Ladd.

1. CITIES AND VILLAGES—*Using Private Sewers—Liability of.*—A village, by connecting its sewers, ditches or drains with the drains constructed by private persons, and by draining the surface water of the streets and the sewage of the village into such private drains, adopts them and becomes responsible for damage done by polluted water passing through them to the same extent as if it had originally constructed them.

2. SAME—*May be Liable as Joint Tort Feasors for an Entire Damage.*—By flowing its sewage through private drains, a village contributes to produce an injury caused by sewage issuing from such drains. It thus becomes a joint *tort feasor* and as such is liable for the whole damage.

Village of Kewanee v. Ladd.

Trespass on the Case, for injuries caused by sewage. Appeal from the Circuit Court of Henry County; the Hon. HIRAM BIGELOW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

CHAS. E. STUETZ and BLISH & LAWSON, attorneys for appellant.

CHARLES K. LADD, attorney for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case by appellee against appellant, to recover damages for injuries alleged to have been sustained by reason of appellant wrongfully flowing water contaminated by poisonous substances, and discharging the same upon lands of appellee, whereby it is claimed his pasture and stock were damaged, and some of his stock and horses killed. There was a trial by jury, verdict for \$750, and judgment for that amount in favor of appellee. Appellant brings the case to this court and insists upon a reversal because it claims:

1. The evidence fails to show that the village of Kewanee has in any way contributed to, or done, the damage complained of by appellee.
2. That the verdict is not sustained by the evidence.
3. That the evidence does not show that the water was the cause of the injury to appellee's stock.
4. That the damages are excessive.
5. That the court erred in giving and refusing instructions.

We think the evidence was sufficient to sustain the verdict.

The village, by connecting its sewers, ditches or drains with the drains constructed by private persons, and draining the surface water of the streets and sewage of the village into these private tile drains, adopted them, and would be responsible for the flowage of polluted water through them, to the same extent as if it had originally constructed

the drain or laid the tile. By flowing its sewage through these private drains the village at least contributed to produce the injury sustained by appellee. It thus became a joint *tortfeasor*, and as such would be liable for the whole damage. We can not say the damages are excessive. Appellant did not attempt, by evidence, to controvert the amount of damages sworn to by appellee's witnesses, and therefore, on that question, the verdict was warranted by the evidence.

We find no material error on the part of the court in giving or refusing instructions, and the judgment will be affirmed.

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J. A. Trawick v. Peoria & Ft. C. St. Ry. Co.

1. **CORPORATIONS—Presumptions as to Power of President of—Notice of Restrictions Necessary.**—The president of a corporation may be presumed to be authorized to employ a bookkeeper for the company and a person so employed is not bound by any by-laws of the company restricting the powers of the president unless he had notice of them.

2. **MASTER AND SERVANT—Wrongful Discharge of—Suits for Amount Due on Salary.**—A servant who was employed for a specified term and wrongfully discharged during such term, has a right to recover his salary according to the terms of the contract, and may bring separate suits for payments due him as soon as they mature.

3. **MASTER AND SERVANT—Discharge Before Expiration of Contract and Offer of Employment at Reduced Wages.**—When a person is employed for a stated time at stipulated monthly wages and is notified of a reduction in his wages before the expiration of the term, an acceptance of continued employment at the reduced rate would be a modification of the original contract, and an abandonment of any claim for more; and a rejection of the offer neither prejudices his right of action nor reduces the amount of his recovery.

4. **PLEADING—Wages Due Under a Special Contract Recoverable Under the Common Counts.**—When a person who is employed under a special contract is discharged without fault on his part before the expiration of the term, he may recover the stipulated wages under the common counts.

Assumpsit, for a wrongful discharge. Appeal from the County Court of Peoria County; the Hon. ROBERT H. LOVETT, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

Trawick v. Peoria & Ft. C. St. Ry. Co.

ISRAEL C. PINKNEY, attorney for appellant.

IRWIN & SLEMMONS, attorneys for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought by appellee in the County Court of Peoria County.

By agreement of parties a jury was waived and a hearing had before the court, which, on March 4, 1896, found for the plaintiff below and rendered judgment against the appellant for the sum of \$226.07 and costs of suit.

The declaration contained only the common counts.

On the trial of the cause it appeared from the evidence introduced that the claim was based on the following contract, dated August 23, 1895:

“CHICAGO, ILL., 8-23-'95.

Mr. J. A. Trawick, Peoria, Ill.

DEAR SIR: We find that appointments made a week or two since are illegal, by reason of the incorporation papers of the Peoria & Fort Clark Street Railway Co. not being filed in the county of Peoria before the officers were elected; I therefore confirm your appointment as cashier and bookkeeper of the Peoria & Fort Clark Street Railway Co. for a term of one year from date, at a salary of \$115 per month, payable semi-monthly.

Yours truly,

F. W. HORNE.

Pres. Peoria & Fort Clark Street Railway Co.

Witness: A. M. SEARLES.”

The appellee immediately entered upon his duties as cashier and bookkeeper for appellant under the terms of his appointment, and continued in such capacity until October 15, 1895, during which time he performed his services in a manner satisfactory to the company, when, on that date, the general manager informed appellee that his salary had been reduced from \$115 to \$90 per month.

The appellee refused to accept the reduction and insisted on his contract.

Mr. Briley, the manager, then told appellee that if he would not accept \$90 per month that he would have to ask for his resignation.

The manager then said "that only left one alternative," and he would have to let appellee out, and said about all there was to do was to turn over the books to Mr. Teter, the cashier, which appellee did. Appellee testified that he had been willing to proceed with his services under his employment.

The suit was commenced the 26th day of December, 1895, and the appellee claimed and recovered from and including the 16th day of October, 1895, to the 26th day of December the same year, at the rate of \$115 per month, making \$226.07.

There is no dispute about the amount of the judgment being correct, provided the appellee had a right of recovery at all according to his claim.

The appellant makes several objections to the appellee's right of recovery; first, that the president of the company had no right to employ appellee; second, that the employment was the individual contract of Horne instead of the company; third, that he might have continued to work for appellant at \$90 a month, received pay for that amount, and then he would only be entitled to recover the excess, \$25 per month; fourth, that appellee could not recover under the common counts for work and labor where breach consists of wrongful dismissal from service.

We think there is nothing in any of these points raised by appellant.

It was clearly the intention of the president to employ appellee on behalf of the company, as the appellee entered upon the service of the company and drew his salary under the terms of his appointment, which clearly shows that he was employed by the company. *Scanlan v. Keith*, 102 Ill. 634.

The president of the company had the power to execute the contract. *Smith v. Smith*, 62 Ill. 496; *McDonald v. Chrisholm*, 131 Ill. 282; *Glover v. Lee*, 140 Ill. 107.

The appellee was not bound by any by-laws of the company restricting the powers of the president unless he had notice of them. *Union Mutual Life Insurance Co. v. White*, 106 Ill. 75; *Ashley v. Illinois Steel Company*, 60 Ill. App. 179; *Smith v. Smith*, 62 Ill. 497.

The appellee had a right to proceed to bring his suit at the end of each period of payment of the salary then due and treat the contract as existing and recover his salary according to the contract. *Hamlin v. Race*, 78 Ill. 422; *Mt. Hope Cemetery v. Widenham*, 139 Ill. 67.

As we understand the evidence the appellee was discharged for the reason that he would not agree to a reduction of his salary; at least the court was justified in so finding. Had appellee acceded to the proposition to reduce his wages and continued to work for \$90 per month, it would have operated as an abandonment of his contract, and, under the proposition made by the company, he was justified in refusing to continue at the reduction.

Had the appellant offered to pay \$90 per month and leave the question open as to the other \$25, it might have presented a different question. *People's Co-operative Association v. Lloyd*, 77 Ala. 387. And the appellant has presented no proof that appellee could have obtained employment elsewhere.

A recovery may be had under the common counts in a case like this. *Halloway v. Talbot*, 70 Ala. 392.

Again, the want of form of the declaration can not be made for the first time in this court. There was no objection to the evidence or motion to exclude and no variance was pointed out in the court below. *L. S. & M. S. Ry. v. O'Connor*, 115 Ill. 260; *Ladd v. Piggot*, 114 Ill. 653.

Many other cases might be cited.

The second refused proposition of law asked to be held for appellant was properly refused. The appellee was under no obligations to search for Horne's authority to employ him.

The third and fourth were also properly refused. They present the proposition that appellee, under the evidence,

was to remain under the offer of \$90 per month, and on failure to do so could only recover \$25 per month.

As we have seen, under the evidence, appellee was not bound to do so.

We see no error in the record. The judgment of the court below is affirmed.

Andrew G. McMullen v. Mary E. Moffitt.

1. **CONTRACTS**—*May Not be Varied by Parol Evidence.*—When both the amount of rent to be paid and the property rented are provided for in a lease it is proper to refuse to allow the defendant, in a suit for rent, to prove that he bought the furniture in the building leased, and that the plaintiff carried off part of such furniture and refused to return it.

2. **EASEMENTS**—*Light and Air.*—In a suit for rent the defendant can not set off damages claimed to have been sustained by the erection of a building on an adjoining lot by which light and air was cut off from the leased premises on the ground that such building was joined to a building on the leased premises by virtue of a party-wall agreement, as neither he nor his landlord had any property in the light and air.

3. **PARTY WALLS**—*Rights of Lessees in Contracts Concerning.*—An agreement to pay part of the cost of a party wall is personal to the party who constructs the wall and the right to recover for the value thereof, when the same is used by an adjoining part owner, does not pass to a lessee, but remains in such original owner.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Henry County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

CHARLES K. LADD, attorney for appellant.

HAND & HAND, attorneys for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit originally commenced before a justice of the peace, by appellee against the appellant, to recover certain rent claimed to be due from appellant to her, for the

use of "the hotel building known as Hotel Main, situate on Main street, in the village of Kewanee."

According to the provisions of the lease appellee was to keep the building in repair during the continuance of the lease, including any necessary repairs to the heating apparatus, and any necessary plumbing, except where the repairs were rendered necessary through the carelessness of appellant.

The party of the first part, appellee, was to do any repairing necessary to keep the building in presentable condition. The appurtenances included in the lease were the lot upon which the same was situated, and that portion of said building leased by Frank H. Davis. The consideration for the lease was a rent of \$100 per month, payable at the end of each month during the continuance of the lease, which was to continue five years from March 8, 1894, the date upon which appellant took possession of the property.

This suit was commenced to recover \$180 back rent, up to September 8, 1895, for portions due for December, January, June, July and August, for which amount judgment was rendered in appellee's favor in the justice court, which amount was reduced in the Circuit Court, on account of payments and offset, to \$109.37.

The Circuit Court refused to allow items of set-off as follows: \$3 for cleaning drain, and \$1.50 for cleaning water closet, and \$1.10 for hose.

In this we think the court committed no error, as the lease did not cover that class of expenses chargeable to appellee, the lessor. The expenditure was not for repairs, nor was it necessary to keep the rooms in the building in a presentable condition.

The court refused to allow evidence offered by appellant to prove that he bought the furniture in the hotel as a part of the consideration of the leasing, and that the appellee withheld and took away furniture and property belonging to appellant, when she went out of the house to let appellant in, and he claimed he should have credit for the value of the property so taken as against the rent claimed to be due.

We think the court committed no error in rejecting this testimony. It clearly would have been a violation of the rule of evidence forbidding a written instrument to be contradicted by parol evidence. It is insisted by appellant that to allow this evidence would only have been to have shown the true consideration of the lease, and that that would have been no violation of the rule. We do not so understand it. The consideration of the lease was the agreement to pay \$100 per month, and the terms of the lease show what was intended to be granted.

It would have been as competent to contradict the lease and show by parol that \$50 monthly was only to be paid as to show that a lot of furniture was conveyed in addition to the realty.

Both amount of rent to be paid and the property leased were provided for in the lease, and were a part of its terms and could not be contradicted by parol evidence.

Another point of defense attempted to be made by appellant was that the appellant was disturbed in a quiet enjoyment of a portion of the leased property, and that he was partly evicted from a portion of the premises by one Dickey, who held a contract for a party wall from the grantor of appellee prior to the time appellee became the owner of the hotel, the said Dickey owning the land north adjoining the hotel property, and that at the time of the lease Dickey was excavating and putting in a foundation and utilizing the said party wall for a building he was constructing upon his lot, and appellant knew he proposed to use the said party wall. Dickey utilized the party wall when he put up his building by cutting into it holes for the timbers of his building, and when he reached the window openings in the party wall he filled them up with a four-inch wall which stood entirely on his own part of the wall and upon his own ground. The appellee had nothing to do with the construction of the Dickey building, but received \$250 from Dickey, due on the party-wall contract, of which she became assignee by her deed from Davis, her grantor.

On a hearing before the court, a jury being waived, ap-

pellant offered to set off certain damages claimed to have been sustained by the erection of the Dickey building, by which light and air were cut off and the hotel made dark inside.

We can see no damage resulting to appellee arising from the party-wall contract. The light and air would have been cut off just the same if Dickey had put up his building without any party-wall contract, and the owner of the hotel building would have no cause of action against Dickey for shutting off his light and air.

One has no property in a prospect, nor in the light and air that passes across the land. An easement can not be claimed in incorporeal servitude of light and air, but even if such right could exist, there was no claim that the hotel building had any right to the light and air coming across the Dickey lot on the north by prescription, and it would appear that the doctrine of ancient lights, as held in England, is not in force in this State. *Guest et al. v. Reynolds*, 68 Ill. 478; *Keating v. Springer*, 146 Ill. 481.

There could have been no eviction of appellant from the enjoyment of any right that could possibly have been granted in the lease. He could not have been deceived into taking the lease on the supposition that there would be no party wall put up, because he knew of the easement and knew that Dickey was preparing to build. Even if a lease, as is contended, implies a warranty of quiet enjoyment and possession, such a warranty has in no way been violated in this case to the damage of appellant, and no warranty could be implied against the light and air being shut off by a building erected on the adjoining lot. The mere fact that there was a partition wall easement could in no way damage the appellant. The appellant was not entitled under his lease to any portion of the \$250 received by the appellee from Dickey for the use of the partition wall.

It was not provided for nor contemplated in the lease, hence the refusal of the court to allow proof on the subject, or to allow any set-off on account thereof, was right.

Seeing no error in the record, the judgment of the court below is affirmed.

Patrick R. Bannon v. Joseph J. Sanden.

1. **NEGLIGENCE—Defective Machinery.**—If an injury results from a defect or insufficiency in the machinery or implements furnished to a servant by his master, knowledge of the insufficiency must be brought home to the master or proof made that he was ignorant of the same through his own negligence or want of care, before he can be held to be liable for such injury.

2. **QUESTION OF FACT—Whether Servant Should Inspect Appliance Furnished by Master is.**—In a suit by a servant against his master for injuries caused by the breaking of a scaffold it is error to instruct the jury that if defendant's foreman told plaintiff that the scaffolding was all right and ready for him to go to work upon, and instructed him to go to work upon the same, that that absolved plaintiff from any care in inspecting the construction of the scaffolding himself to ascertain whether it was safe or not. In such a case it is rather a question of fact than of law whether the plaintiff should inspect the scaffolding before going upon it.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Will County. The Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 9, 1896.

HALEY & O'DONNELL, attorneys for appellant.

MORRILL, SPRAGUE and E. MEERS, attorneys for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

The appellant was a contractor for the Phoenix Horse Shoe Company and contracted to build four buildings in the city of Joliet for it. He contracted to do the stone and carpenter work.

He had about completed the buildings and was proceeding to have the buildings beam-filled at the point of contact of the rafters and the stone work of the buildings, and appellant was directed to do the work.

One Parker Peck was his foreman and appellee was one of the stone masons to do the work.

The beam-filling was being done on the punching rooms

and the roof sloped or pitched to the east or west, and was supported by iron trusses.

The beam-filling was confined to the east and west walls of the building, which were fourteen to sixteen feet high. Scaffolding was so placed near the top of the walls that the body of a mason came up on a level with his work, which would bring the bottom of the scaffold about ten feet from the ground.

The scaffold in question on the west side of the building was so constructed at the north end of it that it was supported by a 4 x 4 piece of pine timber from seven to ten feet in length, and one end resting upon what was denominated an "I" beam, the other end resting upon the wall.

The south end was supported by another contrivance. Lengthwise of the scaffold were pieces of pine timber 4 x 6 inches in size and in the neighborhood of twenty feet in length. Cross-timbers were then placed at intervals of two to three feet and over them were two-inch planks, and then upon the bed thus formed planks were laid across the one-inch boards so as to make a platform about three feet in width. The scaffold was reached by a ladder projecting about a foot above the top of the scaffold, and then a hand-board, fastened on one side, extended between one and two feet higher than the ladder. Upon the scaffold thus constructed two masons worked beam-filling, and three tenders brought up the stone and mortar as required to put in the wall. This same scaffolding had been in use in doing the work on other parts of the building, and the same 4 x 4 piece, which afterward broke, had been used in the scaffold before, and appellee worked on it.

Such a scaffold, as all the workmen understood, to insure safety, should not be overloaded, and in this instance the masons and tenders were cautioned not to overload the scaffold.

On the 26th day of May, 1893, in the forenoon, this scaffolding was put in position and the masons ordered to go to work. They continued to work up to the noon hour, and after noon began work again. The tenders had placed

from two to three hundred pounds of stone and mortar upon this scaffold, and perhaps more. One of the tenders brought up a load of stone and, instead of using care in placing it upon the scaffold, he threw it down in a violent manner and a 4 x 4 piece of timber, supporting the scaffold at the north end, gave way or broke within a foot or eighteen inches of the wall where it had been built into the wall.

The north end of the scaffold fell to the ground and with it appellee, and in falling broke his ankle, and this action was brought to recover damages.

The declaration based the grounds of action upon the alleged negligence of the appellant in not furnishing safe material for the scaffolding, by reason of which it broke, and that the appellant by his foreman directed the appellee, who had no knowledge of the unsafe condition of the scaffolding, to go upon it to complete the wall, and that the appellee while exercising due care went upon it, and on account of the unsafe material and the manner in which it was constructed, it broke and he fell to the ground as stated, breaking his right leg.

The cause was tried before a jury and it brought in a verdict of \$5,000 in favor of the appellee, and on motion for a new trial the court required him to remit \$2,500, which he did, and the motion was overruled and judgment was entered against the appellant for \$2,500 and costs.

From the judgment this appeal is taken.

There are several points urged upon us by counsel for the appellant as good cause for reversal, the principal one of which is that the evidence fails to show the negligence of the appellant in furnishing a good scaffolding, or the timber of which it was composed, by means of which the injury occurred.

The evidence shows, or tends to show, that there was a small invisible knot in the 4 x 4 piece of timber upon which the scaffolding rested that may have caused it to break with a less strain upon it than it otherwise would, and which, if it had been known to appellant, it would not have been proper to have used in the scaffolding in the manner in which it was used.

The evidence also tends to show that the break in the supporting timber might have been caused by the dumping down of the hod by the hod carrier in a violent manner on the scaffold floor when emptying it of stone, and in connection with the weakness of the timber, caused the break and the consequent fall of the scaffold.

If the injury was caused by the negligence of the hod carrier, then the appellant would not be responsible for the consequence of such negligence, as the hod carrier and the appellee were clearly fellow-servants of a common master.

Whether the appellant was negligent in not discovering the defect in the timber, is the main question that requires consideration by us.

It is laid down in *Chicago & Alton R. R. Co. v. Platt*, 89 Ill. 141, that a master is not responsible for latent defects in machinery furnished by him to his servant, and the court uses this language: "It will not be contended that a railroad company will be responsible for a latent defect in the boiler of the engine, or a flaw in a broken rail, of which they had no knowledge, everything to the eye appearing right, and the usual tests discovering no defect."

It is also held in *C. C. & I. Central Railway Co. v. Troesch*, 68 Ill. 545, that "if injury arises from a defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the insufficiency must be brought home to the master, or proof made that he was ignorant of the same through his own negligence or want of care; in other words, it must be shown he either knew or ought to have known the defect which caused the injury; * * * beyond that they owe no duty to their employes, whatever may be their duty to passengers."

In *Goldie et al. v. Werener*, 151 Ill. page 551, the court holds that the plaintiff, in order to recover, is required to establish, first, that the appliances were defective, second, that the master had notice or knowledge thereof, or ought to have had, and third, that the servant did not know of the defect and had not equal means of knowing with the master.

It is contended that a proper examination was not made

of the timber that afterward broke before using it, but we are of the opinion that from the fact it had been used four or five times in the scaffolding without breaking, and from the fact that an examination would not have disclosed any knot in the timber, that an examination would have been useless, unless appellant's foreman had taken the extreme precaution to test the strength of every timber in the scaffold, which we do not think he was required to do.

The evidence of Parker Peck, John Watson, and P. R. Bannon, the appellant, proves that there was no knot perceptible until after the timber broke, only that the wood was a little curly where it broke. The "saw-scarf" did not run to the knot.

There could be found no reason why the timber broke.

There was no sign on the outside where the stick broke—nothing visible.

The evidence also shows that similar timber was ordinarily used for scaffolds, and nothing else used by anybody in the building, and that the strength of such a stick placed as that was, was about 2,200 pounds placed on the scaffold.

We think, therefore, under the evidence in the case that the jury was not justified in finding the appellant negligent in using the stick of timber in question.

Appellant complains, also, that the court erred in giving appellee's eighth instruction, which, in substance, was that if the appellant's foreman told appellee that the scaffolding was all right and ready for him to go to work upon, and instructed him to go to work upon the same, that that absolved appellee from any care in inspecting the construction of the scaffolding himself to ascertain whether the same was safe or not.

We are of the opinion that in view of the evidence in the case that the instruction was erroneous. It was rather a question of fact than of law, whether the appellee ought or ought not to have inspected the scaffolding and timbers composing it before going upon it. All that the foreman told appellee was that the scaffold was complete and ready to go to work upon, and there was no peremptory order to

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go upon it. But, under the circumstances, we might not regard the giving of this instruction as reversible error, as probably, under the evidence in the case, appellee should not be charged with contributory negligence.

The refusing to give appellee's twenty-third instruction under the facts in the case was not error.

The appellant asks for a reversal on account of the prejudices of William Gorman, one of the jurors, and therefore his incompetency.

We are inclined to think that this juror was incompetent, and, if the affidavits filed were true, he was a very unfit person to sit on the jury on account of a deep-seated prejudice against the appellant, which he denied on his *voir dire*; but as the judgment in this case will be reversed for another reason, we need not consider that question.

For the reason that the evidence failed to support the verdict, the judgment of the court below is reversed and the cause remanded.

Serena M. Martin v. Joseph Fielding Martin et al.

1. **APPEALS**—*From County Courts in Probate Matters.*—An appeal may be taken to the Circuit Court from an order of a County Court, on a petition praying that an executor be directed to file an additional inventory and bond, finding the property in dispute to be the individual property of the executor, and not a part of the estate of his testator.

2. **PARTIES**—*What Amounts to Appearance, Personally, of Person Sued as Executor.*—A petition against an executor was filed and he was brought into court in his representative capacity. An amendment to the petition directed against the executor in his individual capacity was subsequently filed, and this amendment he answered individually, and an issue was formed. He defended the charge brought against him, was sworn as a witness in his own behalf, and put in a large amount of evidence to sustain his position. *Held*, that he could not avoid a judgment rendered against him personally, on the ground that he was in court only in his representative capacity.

3. **GIFTS**—*Inter Vivos and Causa Mortis—Requisites of.*—To constitute a valid gift *inter vivos*, possession and title must pass to and vest in the donee irrevocably, and the donor must part with all control of the

68	169
74	217
170	18
68	169
89	149

68	169
101	642

property. A gift *causa mortis* differs from a gift *inter vivos* only in that it is revocable on the recovery of the donor. In either case, if the gift does not take effect as an executed and completed transfer to the donee, either legal or equitable, during the life of the donor, it is a testamentary disposition, and good only when made by a valid will.

4. POSSESSION—*As Evidence of Ownership*.—As a general rule the possession of personal property is *prima facie* evidence of ownership, but such *prima facie* evidence may be easily overcome by proof of circumstances explaining the possession.

5. PROMISSORY NOTES—*Gifts of—Without Indorsement*.—A valid gift of a promissory note, payable to the order of the donor, may be made without indorsement of the note.

6. ASSIGNMENTS—*Of Notes and Mortgages*.—The owner of a note, and mortgage securing the same, may by a separate assignment vest the equitable title thereto in another, and when this is done, and the note, mortgage and assignment thereof are delivered to the equitable assignee, he may enforce collection in equity, for his own use and in his own name, by a foreclosure of the mortgage.

Petition in Probate.—Appeal from the Circuit Court of Kendall County; the Hon. CLARK W. UPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed in part, reversed in part and remanded. Opinion filed December 9, 1896.

ROBERT L. TATHAM and HENRY S. WILCOX, attorneys for plaintiff in error.

HOPKINS, THATCHER & DOLPH and N. J. ALDRICH, attorneys for defendants in error.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was a proceeding in the County Court of Kendall County upon the petition of J. Fielding Martin, one of the defendants in error, against Serena M. Martin, Samuel Beers, and John O'Connor, executrix and executors of the last will and testament of Edward Martin, deceased.

The petition, which was duly sworn to, alleged that Edward Martin, late of Kendall county, Illinois, departed this life at Red Hook, Dutchess county, New York, on December 3, 1893, leaving a last will and testament, in which said Serena M. Martin, Samuel Beers and John O'Conner were named as executrix and executors.

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The said will was duly admitted to probate in the said County Court of Kendall County, on the 14th of December, 1893. That the executors on March 5, 1894, filed in said County Court an incomplete inventory, and the petition avers that said executors or some of them knew it was an incomplete inventory. Further avers that the petitioner had reason to believe that the executors or some of them, knowingly withheld and assisted in secreting part of the goods, chattels and credits of the said testator from such inventory. The petition prays for a citation against the executors and that they may be required to give additional bond as such executors, and to produce certain notes, mortgages, bonds and securities mentioned in said petition (and which will hereafter be more particularly described), and that they also be required to file a supplemental or amended inventory, or show cause why the same should not be done. Upon this petition a citation issued against the executors and executrix as prayed. The petition was dated and filed April 24, 1894. The cause was continued from time to time until August 20, 1894, when the petitioner, Joseph F. Martin, filed an amendment to the petition by leave of the court, in which it was alleged that "said Serena M. Martin has in her hands and possession certain notes, bonds, mortgages and school bonds, etc., that were the property of said deceased in his lifetime, and as your petitioner is informed, claims the same as her own property, which, as your petitioner states and charges the fact to be, is not the case or fact." And he prays that she be required to bring into court all such papers, bonds, etc., to abide the further order of the court.

The executrix and executors answered the petition denying the allegations therein contained, and denying that as such executrix and executors they have in their possession, or under their control, any of the securities mentioned in the petition, and say they can not produce the same.

On a hearing of the cause the County Court found the securities in dispute to be the individual property of Serena M. Martin, and not a part of the estate of Edward Martin, deceased, but required the executors to file an additional in-

ventory only as to the sum of \$40.25 cash, belonging to the estate, and which they had omitted to include in their original inventory.

From this order of the County Court the petitioner, J. Fielding Martin, prayed an appeal to the Circuit Court, which was duly allowed.

After the cause reached the Circuit Court, plaintiff in error by her solicitors filed her separate answer as follows :

" Answer of Serena M. Martin to the petition or application of J. F. Martin as amended.

Now comes Serena M. Martin and saving all right of exception to the petition of J. F. Martin as amended, and protesting that the court has no jurisdiction to try the issue sought to be made against her therein, or to try and determine in this proceeding the title to said property so far as her personal interest is concerned, says that she denies that she has in her possession any notes, bonds, mortgages, school bonds, or other property which was the property of the deceased in his lifetime, which she claims as her own, but she says that the property, or no portion thereof, described in said petition as amended, is the property of said estate, but is her individual property.

Wherefore she prays that said appeal be dismissed and that she be hence dismissed with her reasonable costs and charges," etc.

The court refused to dismiss the appeal and plaintiff in error excepted. Upon a hearing of the cause, the Circuit Court found against plaintiff in error, and held that all the securities in dispute belonged to and were a part of the estate of said Edward Martin, deceased, and that said Serena M. Martin, in her individual capacity, wrongfully retained the same and refused to deliver them to the executors of said deceased, and ordered her to turn over to said executors all of such securities, together with all moneys collected thereon, to be inventoried, accounted for, collected and distributed, under the direction of the County Court of said Kendall county, and that she have thirty days in which to comply with the order. Plaintiff in error excepted to this order

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and moved the court to set aside the findings and orders aforesaid, and for a new trial. The court denied the motion and plaintiff in error excepted. She brings the cause to this court by writ of error, and enters upon the record thirty-four assignments of error. We have not the time nor do we deem it necessary to discuss these assignments of error *seriatim* or in detail, but will consider such of them as we think have the most important bearing upon the correct determination of the questions involved. The first point made and most strenuously urged by plaintiff in error is that the Circuit Court was without jurisdiction, because it is claimed the order of the County Court was not a final order, and therefore not appealable, and also on the ground that the plaintiff in error was never brought into court in her individual capacity, but only as an executrix of the will. We think both points must be determined against her.

Sec. 124, Chap. 3, Rev. Stat. (1 Starr & Curtis, 247), provides that "appeals shall be allowed from all judgments, orders or decrees of the County Court, in all matters arising under this act, to the Circuit Court in favor of any person who may consider himself aggrieved by any judgment, order or decree of such court." * * * This provision was broad enough to allow the appeal to the Circuit Court in this case.

Upon the other point, while it is true that plaintiff in error was originally brought into court in her representative capacity, yet the amendment to the petition was directed against her personally and in her individual capacity, and this amendment she answered individually, whereby an issue was formed as to the question whether or not the securities in dispute belonged to her personally or to the estate of her testator. She defended as to the charge brought against her, was sworn as a witness in her own behalf, and put in a large amount of evidence to sustain her individual claim to the property involved, and we are of the opinion it is now too late to insist that she was not in court in her individual capacity. We think there was no error in the action of the trial court upon these questions. We find no

serious error in the rulings of the court upon the admission or rejection of evidence, and we think the court held properly as to propositions of law governing the case. The real point of difficulty is to determine whether the trial court, upon the facts appearing in the evidence, was right in adjudging that as to none of the notes, bonds or securities in controversy was there such a delivery, such a completed gift within the rules of law governing such cases, as to vest the title in plaintiff in error. To this question we have given most earnest consideration, and will now proceed to its discussion.

The testator, Edward Martin, for many years before his death, resided on a farm at Red Hook, New York. He was a bachelor, upward of eighty years old when he died, which was December 3, 1893. Up to about fifteen years prior to that time his sister, Serena Martin, kept house for him.

When she was about nine years old, plaintiff in error was taken into the family of Edward Martin, and since the death of her aunt Serena Martin, kept house for the testator up to the time of his death. All the evidence shows that the deceased held plaintiff in error in very high esteem, treating her affectionately during his life, and the proofs are abundant, that he intended, out of his great wealth, to make ample provision for her comfortable support and maintenance after he should be called away. During his life he deeded to her the homestead at Red Hook, consisting of a farm, which one of the witnesses estimates to be worth about \$20,000, but whether it produces any income or not does not clearly appear. In addition he gave her some personal property, but there is no satisfactory evidence of its value. By his will he directed that his estate should be divided into forty-two shares, giving two shares each to eighteen of his nephews and nieces, among whom were plaintiff in error and the petitioner, Joseph F. Martin, one of the defendants in error. By subsequent codicils he made some slight changes, not important to be considered in the determination of the questions involved in this case.

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The inventory originally filed by the executors, showed the aggregate of Edward Martin's estate to amount to about the sum of \$300,000, which being unsatisfactory to some of the legatees, inquiry and search were made for other property, resulting in the discovery that plaintiff in error had in her possession about \$167,000 worth of securities which at one time had been the property of the deceased, and which she claimed had been given to her by Mr. Martin in his lifetime. To test the validity of this claim on her part, the petition in this proceeding was filed and the litigation already detailed was the result.

The securities in controversy may be divided into three classes, as follows:

First: The Phipps notes, being two promissory notes for \$50,000 each, executed by Henry Phipps, Jr., payable to his own order and indorsed to the deceased, as part payment for the purchase of a tract of land called "Brighton Farm."

Second: Bonds of the Minneapolis Street Railway Company, to the amount of \$10,000, and certain Illinois school bonds to the amount of \$7,000.

Third: Patrick Smith notes.....	\$ 5,200
John B. Howard notes.....	4,000
George A. Buck notes.....	6,000
Carsten Lankinan note.....	4,000
Catholic Bishop of Chicago.....	16,000
" " " 	5,000
" " " 	6,000
" " " 	4,000

All secured by mortgages and aggregating.....\$50,200

For convenience of reference we will hereafter refer to the first class as "the Phipps notes;" to the second class as "the bonds," and to the third class as "the Illinois mortgages."

The claim of plaintiff in error to these securities depends upon the question as to whether or not there was a valid gift of them to her during the lifetime of the deceased,

Edward Martin; such a gift as can be upheld by the courts under the well established rules of law governing gifts *inter vivos*.

It will be unnecessary to go into any extended discussion of the authorities as to what will constitute a valid gift *inter vivos*. The decisions in our own Supreme Court are clear and explicit upon that subject. In the case of Telford v. Patton, 144 Ill. 611, it was held that "it is essential to a donation *inter vivos* that the gift be absolute and irrevocable, that the giver part with all present and future dominion over the property given; that there be a delivery of the thing given to the donee; that there be such a change of possession as to put it out of the power of the giver to repossess himself of the thing given. The delivery must be made with the intent to vest the title in the donee." And again, in Barnum v. Reed, 136 Ill. 388-398, our Supreme Court say: "The law requires the gift, whether direct or in trust, shall be established by clear proof, and that no uncertainty shall exist either as to the subject or object of the gift." And again: "*Donatio mortis causa* must be a completed and executed gift, the same as a gift *inter vivos*. If the gift does not take effect as an executed and completed transfer to the donee, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only when made by a valid will. That is, the act or acts constituting the transaction must be consummated, and not remain incomplete or rest in mere intention, and this is the rule whether the gift is by delivery only or by the creation of a trust." And again "to constitute a valid gift *inter vivos*, possession and title must pass to and vest in the donee irrevocably. In this respect alone a gift *causa mortis* differs from that of a gift *inter vivos*, as in the case of the former it is revocable on the recovery of the donor. * * *

The donor must part with all control of the property in order to make a valid gift. If he reserves any right or title the gift will be incomplete." This is a sufficient statement of the law applicable to the principal question involved in the case now under consideration, and the rights of the

plaintiff in error must be governed by the rules thus laid down. Under these rules does the evidence establish a valid gift to plaintiff in error of the property in controversy? So far as the "Phipps notes" and the "bonds" are concerned, we entirely agree with the learned judge who tried this cause in the court below, that it does not. It is true that all these securities were found in the possession of plaintiff in error, and her counsel lay much stress upon this fact, as raising a presumption of ownership, but it is equally true that all the securities belonging to Edward Martin's estate were also in her possession, as well those she claims as those she does not. While there is no doubt the general rule of law is that the possession of personal property is *prima facie* evidence of ownership, yet the *prima facie* evidence of ownership may be readily overcome by the proof of circumstances explaining the possession. In the state of the evidence in this case, we think but little importance should be attached to the mere fact, standing alone, that plaintiff in error was in the actual possession of the securities. We think, further, that notwithstanding the possession of plaintiff in error, under the circumstances shown by the evidence, when the fact was proven that the securities in question were at one time the property of deceased, then if plaintiff in error claimed them as a gift to her from the testator in his lifetime, she took the burden of establishing such gift by clear and satisfactory evidence.

The proofs upon which plaintiff in error seems to rely to establish a gift to her of the Phipps notes, is the fact that she rented, in her own name, a safety deposit box in the vaults of the Poughkeepsie National Bank, at Poughkeepsie, N. Y., in which the testator, from time to time, placed notes and securities, and among them the Phipps notes, with the statement that they were for her, and also statements to the president and cashier of the bank that all that was in her box was hers. To Mr. Beers, one of the executors of the will, the testator stated that he had put securities in Serena's (plaintiff in error's) box, "which was her property

and was no part of his estate, and that he wanted his executors to keep their hands off of it." Also, letters written by testator to plaintiff in error, particularly one of December 13, 1890, in which he says to her: "I have placed in your box in safe deposit vault at Poughkeepsie National Bank, certain bonds, securities, deeds, bills of sale, etc., which I have given to you and delivered to you, and I write this that there may be no doubt of the fact that everything in your box is yours absolutely. Judge Taylor, of Poughkeepsie, and George Cornwell, cashier of the Poughkeepsie National Bank, have knowledge of my intentions as above. Your affectionate uncle, Edw'd Martin."

From all the evidence it is very clear that the deceased intended that plaintiff in error should have the securities he thus placed in her box, and there can be no doubt that if, by placing the securities in her safety deposit box, he intended thereby to make a gift thereof to her, to take effect *in presenti*, and divesting himself of all future control thereof or right therein, this would have been a complete and valid gift *inter vivos*. The court below so held in substance. But unfortunately for the case of plaintiff in error, there is much evidence tending to show that the testator did not intend to surrender entire control of this property, and did not understand that he had done so. The able judge who tried this cause delivered an opinion in the case, in which the evidence on this subject is reviewed, and perhaps it is better set forth there than the writer hereof could state it, and from that opinion we quote as follows:

"It will be noticed that the evidence shows that decedent, shortly before his death (and only a few weeks prior thereto) in a conversation with one of the executors, Mr. Beers, stated that in the rat-proof box, so-called, would be found an inventory of his entire estate, and what property he owned, which would enable the executors to make inventory thereof. Among the items there inventoried are the Phipps notes—without note or comment of any disposition thereof to any one. These notes were taken by Edward Martin, decedent, to Chicago, and payment of the semi-annual in-

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terest thereon made to him personally from time to time as the same fell due, the last payment of interest being made to decedent on the 23d of June, 1893. Edward Martin then had the manual possession of these notes at that time in Chicago, and claimed to control the same and the amount due thereon. Not only that he controlled in fact, the time and method of the future payment thereof, and the rate of interest to be paid thereon, but entered into a contract of extension for the payment thereof in his own name, under his seal with the maker and payee thereof, which contract of extension and change of time and terms of payment of both principal and interest was by the decedent, Edward Martin, signed and acknowledged in due form of law before a notary public in New York, on the 17th day of November, 1893, but sixteen days before his death. It further appears that a duplicate extension of the same import was executed by the decedent, Martin, dated June 23, 1893, and acknowledged on the 25th of September, 1893, and upon these different occasions during the summer and autumn before his death and up to about two weeks prior thereto decedent had possession of, contracted and claimed the right, and in fact exercised control of the notes, and the mortgages securing the same, as his own individual property and estate. * * * There is nothing upon the notes or mortgages to show that Edward Martin had ever parted with possession or title thereto, and every presumption arising from business precedents would be, that as the notes were indorsed in blank by the payee, the original notes must have been in decedent's possession and produced, before a contract for the extension of this large sum of money would have been consummated. We further find from the evidence, that decedent, on the 17th of November, upon an unexecuted contract or copy thereof for that extension, in his own hand, in pencil memorandum, made this entry: 'I have retained a copy of this for use at my desk, as the duly executed agreement, received this morning, will be deposited in my safe vault box, distant from Red Hook, November 17, 1893.'” The learned judge does not profess to review all the evidence upon which he

based his conclusions as to the Phipps notes, but there is other evidence tending strongly to sustain his view. It will be noticed that in his diary entry of October 11, 1892, which is shown to be in the handwriting of decedent, he speaks of putting the two Phipps notes of \$50,000 each in Serena M. Martin's box in safety deposit vault together with other securities, but he says not a word as to his reasons for putting them there. The same is true as to the entry of May 23, 1893. In the entry of June 14, 1893, he speaks of taking the Phipps notes from the box to take to Chicago, so that he certainly had them there when the agreement for an extension was made. It thus appears from the evidence that whatever the decedent may have said or written concerning a gift of the Phipps notes to plaintiff in error, his acts are at variance with any idea of a completed and valid gift *inter vivos* within the rules of law governing such gifts.

His dominion over and control of the notes was exercised as fully and freely after they were placed in Miss Martin's box as before. After the death of Edward Martin there was found in the safety deposit box of plaintiff in error a sealed letter written by deceased, and addressed to himself, but upon the outside of which were the words: "With directions to Serena M. Martin to open this after my death." This letter was dated at Red Hook, May 13, 1893, nearly seven months before testator's death. In this letter Mr. Martin tells plaintiff in error that she will find in her box certain securities, among which he mentions \$30,000 of bonds and the Phipps notes, and tells her that these securities are her private property, and are not to be inventoried as a part of his estate, and then gives her advice as to the care she should take of her property, etc. But he concludes his letter as follows: "Some of the bonds (\$30,000) named above as in your box, have matured and been collected, and assignments of other notes and mortgages than those above named will be added to your personal estate from time to time, at my convenience, and placed in your box in the safe deposit vault, and everything in your box is yours."

Mr. Martin evidently thought that he could put securities

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into his niece's safety deposit box, collect the same as they became due, change securities from time to time, as he might find convenient, manage and control them during his lifetime, and then, because he had told her and others, that whatever was in her box was hers, and was not to be considered as a part of his estate, that at his death she could retain and hold all such securities as then might be found in the box. A careful examination of the evidence satisfies us that this was his intention and expectation. He supposed, like many another man under like circumstances, that he had made ample provision for the object of his bounty, but he was simply mistaken. The law does not permit a man to own and control his property during his lifetime, and make a valid disposition of it at his death, except by means of a duly executed will. The law points out the mode in which testamentary dispositions of property may be made, and has wisely excluded any other. In this case we think the evidence shows that the decedent had access to the deposit box of plaintiff in error as freely as to his own; that he handled the securities therein and controlled them as he pleased; and by the letter left to be opened after his death, he tried to consummate a gift of the contents to his niece, which being an attempt to avoid the operation of the statute of wills, did not become effective. Without further discussion of that question, we hold that the trial court was right in finding that no valid gift of the Phipps notes was made by decedent to plaintiff in error, but they must be held and treated as a part of his estate.

What has been said with regard to the Phipps notes, is equally applicable to the bonds. But in addition thereto we have the diary entry of June 20, 1890, as follows: "Went to Poughkeepsie with Serena M. Martin. She rented box. I put ten street railroad bonds, \$1,000 each, in her box, being a delivery to Serena of the bonds now, but her ownership of them to be simultaneous with my death." By the personal direction of decedent these bonds had been so registered as to be paid to Edward Martin and after his death to Serena M. Martin, and the interest was paid to him semi-annually

up to his death. We think this action with regard to the bonds was in harmony with that concerning the Phipps notes, and that as to both, it was but a mere attempt to make a testamentary disposition of them without the forms of law necessary to accomplish that purpose, and was therefore void. We hold that the action of the court in regard to the bonds was proper and it will be affirmed.

This brings us to the third class of securities, which we have above designated as "the Illinois mortgages," and which amount in the aggregate to \$50,200. As to these notes and mortgages we have arrived at the conclusion that plaintiff in error's claim to them can properly be sustained and upheld for the reasons which we will proceed to give.

In the first place, these securities are shown by the evidence to have been in the possession of plaintiff in error for some time before Edward Martin's death. According to the testimony of the witnesses, which is in no way contradicted, these papers, consisting of the notes, mortgages, and duly executed assignments of the mortgages, pinned thereto, were done up in a piece of curtain calico, with a strap around them which fastened with a buckle. Plaintiff in error kept them in a closet or clothes press in the room occupied by herself, which closet or clothes press was locked and she carried the key. They were not in her safety deposit box nor in the possession of Edward Martin, nor among his papers at the time of his death nor for some time prior thereto. About two weeks before his death, deceased asked plaintiff in error for these papers, saying he had neglected to attend to something in connection with them, and that he had to take them and attend to them. The witness, Margaret J. Martin, swears she saw plaintiff in error take the package out of her closet and hand it to the decedent. She further swears that on the same day she saw decedent hand the package back to plaintiff in error telling her that they were hers; that he had been called away and had not time to attend to it then. The witness further testifies that plaintiff in error showed her the papers in the package, and enumerates the notes and mortgages which we are now

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considering. She testifies also that she saw plaintiff in error take a package out of the cupboard which she unlocked with a key that she, plaintiff in error, carried in her pocket. The witness, Elizabeth H. Martin, testifies that about April 17, 1893, decedent handed her a package to give to plaintiff in error on her return, she being then absent. That the package was four or five inches in thickness and about the length of legal envelopes, and told her the package contained valuable papers, which were valuable to plaintiff in error and to no one else. This package the witness testifies she gave to plaintiff in error on her return. While there is no direct evidence as to what this package contained, yet we think the evidence shows it was the same package referred to by Margaret J. Martin and in connection with the other evidence it may be regarded as having some weight in determining the question of delivery and the intent of the testator in relation thereto.

It will be observed that the possession of plaintiff in error as to these particular securities called Illinois mortgages was quite different from her possession of the other assets of the estate. With the knowledge and acquiescence of decedent, she had them in her own possession, locked up in a closet in her own room, to which she carried the key, and when he wanted them he asked her for them, and then returned the papers to her, being particular to state to her in the presence of a witness that they were hers. What he wanted to do to the papers does not appear, but the actions of the parties are entirely consistent with the claim of the plaintiff in error that he had made a gift of them to her before that time. We think the fact of her possession under the circumstances is entitled to a good deal of weight, and tends strongly to show that her contention as to the gift of those securities to her is correct. But in addition to this, decedent had taken pains to execute formal assignments of these mortgages to plaintiff in error duly acknowledged before a proper officer, and we think the evidence shows that these assignments pinned to the mortgages were in the package done up in the calico and in the possession of

plaintiff in error at the time of decedent's death, and for some time before. These assignments purported to assign the notes as well as the mortgages given to secure the same. Then again, upon the inventory book, where decedent had entered these securities, there appears as to all of them except one note of George A. Buck for \$3,000, indorsed in the handwriting of decedent against each one separately, the words "assigned to S. M. Martin" who, it will be conceded, was plaintiff in error. So that not only had plaintiff in error the possession of these securities, but she had formal assignment of them from the testator, with the notation thereof in his inventory book, while there is no evidence tending to show that he ever had any possession or control of them after the time when, but two weeks before his death, he handed them back to her with the statement that they were hers. We think all these facts taken together are sufficient to establish a valid and completed gift of these Illinois mortgages, within the rules of law above stated. It is true, the notes themselves were not indorsed by the testator and it may be that this was the thing which he thought rendered the matter incomplete, and which he had in mind to do when he called for the package two weeks before his death, but we do not regard it as being essential to a complete gift that the notes should have been actually indorsed. What was done was sufficient to vest in plaintiff a valid equitable title to the notes, although not the legal title. We do not regard the case of *Barnum v. Reed*, *supra*, as being in conflict with this view. In that case the court say: "There can be no pretense that Mrs. Davis transferred the legal title of the notes and certificates of deposit to Barton. That could be done only by indorsement."

But the court were then considering the question as to whether or not Mrs. Davis had constituted Barton a trustee for the benefit of Mrs. Reed and were not passing upon the effect, had Mrs. Davis delivered the notes and certificates of deposit to Mrs. Reed as a gift without indorsement. There is nothing in the case to show that the court intended

to hold that the equitable title to a note and mortgage could not be vested in a donor, by a gift of the same and a delivery thereof, without indorsement by the donor. We have no doubt that, in equity, the owner of a note and mortgage securing the same, may by a separate assignment vest the equitable title thereto in another, and when this is done, and the note, mortgage and assignment thereof are delivered to the equitable assignee, he may enforce the collection in equity for his own use and in his own name, by a foreclosure of the mortgage. *Barrett et al. v. Hinckley*, 124 Ill. 32-41.

The courts of this state very early recognized the right of the equitable assignee of a promissory note to collect the same by suit in the name of the payee for the use of the assignee. *Ranson v. Jones*, 1 Scam. 291.

In the latter case it was said: "Where there has been a transfer of a bond or instrument, without a regular assignment to authorize the assignee to institute a suit in his own name, courts will always permit the use of the name of the person to whom it is made payable, without an express power so to do. * * * Indeed courts are bound to protect the interest of the holder."

In the case of *Grover, Adm'r, v. Grover*, 24 Pick. 261, it was expressly held that a valid gift may be made, *inter vivos*, of a promissory note payable to the order of the donor, without indorsement by him or other writing, and that the donee might, upon the death of the donor, maintain an action against the maker of such note in the name of the donor's administrator, even against the consent of the latter. And it was also held that the gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as a sale. We think the principles announced in that case should govern in the one now under consideration, and our conclusion is, that by the acts of the testator the equitable title to the securities called the Illinois mortgages passed to and vested in plaintiff in error, and such equitable title should be respected and protected by the courts. While courts of probate in

this State have but limited equity powers, yet in such matters as are involved in this proceeding, we think they should be governed by equitable principles, and in this view we think the court below erred in holding that plaintiff in error was not entitled to hold the securities we are now considering, and in ordering them to be turned over to the executors to be inventoried, accounted for and distributed as a part of the estate of Edward Martin, deceased.

As to so much of the order of the Circuit Court as relates to the Phipps notes and the bonds, it will be affirmed, but as to so much of said order as relates to the Illinois mortgages, amounting to \$50,200, it will be reversed, and the cause remanded with directions to the Circuit Court to enter an order in accordance with the foregoing findings, and holding the Illinois mortgages to be the individual property of plaintiff in error and no part of the estate of Edward Martin, deceased.

Reversed in part and remanded with directions.

Henry Harms and The Home National Bank v. Charles R. Frost et al.

1. *VENDOR'S LIEN—General Principles.*—Whether a vendor's lien will be enforced in any given case depends so entirely upon the facts involved that no general rule can be laid down that can cover every kind of a case. As between vendor and vendee alone, a lien will be sustained: but as between that lien and a mortgage lien, the latter is generally preferred.

2. *SAME—Liens Accruing at the Same Time.*—Of two liens accruing at the same time, the legal lien of a recorded mortgage must be deemed superior to the secret equity of a vendor.

3. *SAME—Failure to Give Notice of.*—A vendor of real estate, who allows third parties to spend their money in improving it, under the provisions of a mortgage made to them by the vendee, without making any protest or claim of a vendor's lien, will not be allowed to set up a claim to a lien as against such parties.

4. *DEEDS—Pass Title When Delivered.*—A deed, without being recorded, if delivered to the grantee, or some one for him, passes title as effectually as though it were recorded.

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Bill, to foreclose trust deed. Appeal from the Circuit Court of KNOX County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded with directions.

STATEMENT OF THE CASE.

This was a bill in equity commenced by the appellees, Charles R. Frost, Robert W. Frost, John W. Frost and Edward J. Frost, comprising the firm of Robert Frost's Sons, and Samuel L. Charles, to foreclose a certain trust deed executed by the Galesburg, Etherly & Eastern Railroad Company, dated the 5th day of May, 1894, and recorded in the recorder's office of Knox county May 7, 1894, and executed to the Royal Trust Company to secure the payment of \$120,900 of first mortgage bonds of \$500 each as hereinafter mentioned, of which appellants, Robert Frost's Sons, claimed to own \$40,000 worth, or eighty bonds, and appellant Harms \$60,000, and the Home National Bank of Chicago, Ill., \$20,000, and a claim by appellee for money furnished for right of way and expenses incurred by them. We adopt the following statement prepared by appellant's counsel:

The Galesburg, Etherly & Eastern Railroad Company was incorporated April 7, 1894, under an act of the General Assembly of the State of Illinois relative to corporations in force July 1, 1891, and was so incorporated for the purpose of constructing and operating a railroad from Wataga, in Knox county, Illinois, beginning at a point north of the depot of the Chicago, Burlington & Quincy Railroad, in said Wataga, and running in an easterly direction to the coal lands of the Galesburg Coal Company in said Knox county, and to and through a town site to be located in the immediate vicinity of the said Galesburg Coal Company's lands, to be named "Etherly." The capital stock of said railroad company was divided into fifteen hundred shares of one hundred dollars each, or \$150,000.

On the 24th day of April, 1894, a contract was entered into by the said Galesburg Coal Company, party of the first part, the Brown & Windsor Construction Company, party of

the second part, and W. H. Bates, Samuel L. Charles and Robert Frost's Sons, party of the third part.

Under this agreement and in consideration of the agreements of the parties of the first and third parts, the party of the second part undertook and agreed to construct the Galesburg, Etherly & Eastern Railroad, erect depots, purchase a locomotive and such other equipments as might be necessary. The party of the third part agreed to furnish a sum of money necessary to purchase the right of way, and where right of way could not be purchased, the same to be procured by condemnation proceedings, and paid for by the said third party, title to rest in the railroad company. Third party also agreed to guarantee the contract of second party with the Illinois Steel Company for the purchase of all rails to be used in the construction of said railroad in a sum not exceeding \$30,000. The Brown & Windsor Construction Company, the second party therein, was to deliver to the said W. H. Bates, Samuel L. Charles and Robert Frost's Sons, the party of the third part, the first mortgage bonds of said railroad company at seventy-five cents on the dollar in an amount equal to the sum expended for right of way and the amount guaranteed the Illinois Steel Company for rails; also as collateral, the entire stock of the railroad company. The Brown & Windsor Construction Company by this contract agreed to protect and save harmless the third party thereto in its said guaranty to the Illinois Steel Company for rails not exceeding \$30,000, and to meet and discharge its obligations on or before maturity, and failing so to do, the rights of the second party under said contract to be forfeited to third party thereto.

Upon the performance of the covenants on the part of the second party, the first party, the Galesburg Coal Company, agreed to deliver to the Brown & Windsor Construction Company thirty-five hundred shares of full paid non-assessable stock of the said Galesburg Coal Company, and when the notes given for rails were discharged, the third party agreed to release the railroad stock held as collateral (except that part thereof held as security for money advanced

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to pay for right of way, which was not to be released unless such money should be repaid within a reasonable time), of which entire stock the third party was to own thirteen-twentieths, and the second party seven-twentieths. Said agreement further provided that any unsold railway bonds or proceeds thereof not used in the construction and equipment of the road at date of its completion should revert to the treasury of the said railroad company. Said agreement further provided that a town site company should be formed to promote a town on the lands of third party, the location to be agreed upon, which lands were to be sold to such town site company at not more than \$60 per acre, and in this town site the party of the second part should have a four-tenths interest.

On May 4, 1894, Henry Harms and J. S. Spikings entered into an agreement in the nature of a sub-contract with the Brown & Windsor Construction Company, in and by which contract the said Harms and Spikings agreed to build the Galesburg, Etherly & Eastern Railroad between the points designated in the articles of incorporation, and to furnish the material and do the work necessary in its construction; the Brown & Windsor Construction Company to furnish steel fastenings and locomotive and construction cars free of charge, to be operated by Harms and Spikings. For such construction the Brown & Windsor Construction Company agreed to pay to Harms and Spikings \$45,000, to be evidenced by the collateral notes of the Construction company, to be secured by \$60,000 of the first mortgage bonds of the Galesburg, Etherly & Eastern Railroad Company to be held as collateral. Some of which note and bonds were to be delivered as the work progressed, the balance to be delivered when the road was completed. Harms succeeded to all the rights and interests Spikings had under said contract.

By trust deed of May 5, 1894, and recorded May 7, 1894, in the recorder's office of Knox county, Illinois, the Galesburg, Etherly & Eastern Railroad Company conveyed to the Royal Trust Company, all and singular its railway and

railways, with the road-bed, grades, right of way, bridges, depots, grounds, fixtures, and all its property of every kind and nature, acquired or which might thereafter be acquired, in its name or in its behalf, including all its franchises, privileges, net income and revenue which might arise from the use and operation of said railroad. Said trust deed recited that the said railroad company had already commenced the construction of the railroad, and was desirous of borrowing money to complete and equip the same, and to carry out a resolution passed by the board of directors thereof, and approved by the stockholders, had determined to issue the bonds, to be designated first mortgage bonds, in an amount not exceeding one hundred and twenty thousand dollars, and that, in order to carry out the resolution of said company and to secure said bonds, the president and secretary were authorized to execute a trust deed to the Royal Trust Company. The said trust deed further recited that the said issue of bonds and the execution of said trust deed were authorized by resolution of the board of directors of the railroad company, unanimously passed.

The bonds secured by said trust deed were two hundred and forty in number, each for the sum of \$500, and due on July 1, 1914. The semi-annual interest upon said bonds, until maturity, at 6 per cent per annum, were evidenced by coupons attached thereto. Each of said bonds recited that "the payment of which is secured by a mortgage of even date herewith, giving a first lien upon the railway franchises and equipment described therein, made by said railroad company to the Royal Trust Company, of Chicago, as trustee, and duly recorded."

On June 6, 1894, an agreement, supplemental to the one of April 24, 1894, was made, which, after reciting the provisions of the said former agreement, stated that the Brown & Windsor Construction Company did thereby deposit, deliver and assign to W. H. Bates, S. L. Charles and Robert Frost's Sons, \$40,000 face value of the first mortgage, twenty-year, six per cent gold bonds, of said railroad company. Said agreement further provided "that, in the future, and as soon

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as it can be done," there should also be deposited with and assigned and delivered to W. H. Bates, S. L. Charles and Robert Frost's Sons an additional amount of first mortgage twenty-year, six per cent gold bonds of said railroad company, sufficient, at seventy-five cents on the dollar, of the face or par value thereof, to equal the money paid out for right of way. Although this agreement was signed only by the Construction company, it was recognized by the parties to the first agreement, and under it the appellees obtained title to the bonds they owned. The sale of collateral under notice, introduced in evidence, was made under and by virtue of the authority given appellees and W. H. Bates therein.

Under these several contracts and agreements the railroad was built. Henry Harms took from the Brown & Windsor Construction Company their notes for work done and material used in its construction. He also took the one hundred and twenty mortgage bonds as collateral to these notes, and after default had been made in the payment of the notes, he became the owner of said one hundred and twenty bonds, absolutely. The Home National Bank, of Chicago, loaned money to the Brown & Windsor Construction Company, and took the notes of said Construction company for such loans, and, as collateral, took the forty bonds owned and controlled by it as security for said notes.

By the bill of appellees, and the answer of appellants, Harms and the Home National Bank, foreclosure of mortgage securing the mortgage bonds is prayed, and decree of foreclosure rendered therefor. In addition to the foreclosure upon the bonds held by them, appellee also claimed a first lien upon the right of way and road-bed of the mortgaged premises, on account of advances made by them for the purchase of the right of way, as will be seen hereafter.

As between the appellant Harms and appellees, in so far as the bonds and their relative rights and liens thereunder are concerned, no question is made in this case. Plaintiff below, and appellees here, secured their bonds, eighty in number, in effect in consideration of money advanced to-

ward the construction of the road. Defendant below, and appellant here, Harms, secured his bonds, one hundred and twenty in number, in effect in consideration of work and labor also entering into the construction of the road. Thus far the equities of the parties are equal.

By the terms of the contract, as seen above, between the Brown & Windsor Construction Company and appellees, the latter were to guarantee the notes of the Construction company on account of steel rails to the extent of \$30,000, and, in fact, subsequently paid this amount on such guaranty. Appellees, under the contract, were also to advance the necessary amount of money to secure the right of way for the railroad. For these advances, so to be made, appellees were to receive as collateral security enough of the mortgage bonds of the railroad company, held by the Construction company, at the rate of seventy-five cents on the dollar, as would equal the sum expended for rails and right of way; and were also to receive as additional collateral security the entire stock of the railroad company, amounting to \$150,000.

By the subsequent agreement between the Construction company and appellant Harms, the latter agreed to furnish the material and the labor for the construction of the railroad, at an agreed price, to be secured by the mortgage bonds of the railroad company, amounting in the aggregate to \$60,000, as collateral. These bonds were subsequently delivered to appellant Harms, pursuant to the agreement, and became his absolutely by collateral sale thereof.

By the subsequent and supplemental agreement between the Construction company and appellees \$40,000 of the mortgage bonds and \$149,500 of the railroad stock were then delivered to appellees in pursuance of the terms of the original contract, and at the time of such delivery it was further agreed "that in the future, and as soon as it can be done," there was also to be delivered to appellees an additional amount of the mortgage bonds, sufficient at seventy-five cents on the dollar to equal the money paid out on right of way account, as security for the faithful performance of the

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agreements embraced in the original and supplemental contracts of the Construction company with appellees. This supplemental contract also empowered appellees to sell the securities on the default of the Construction company; and a default having occurred, this was done.

The decree finds that appellees have paid out for right of way and expenses, the sum of \$15,351.36, and that they should have had under the terms of the contracts, original and supplemental, \$20,468.40 of the first mortgage bonds, and in equity are deemed to have received that quantity of the bonds; and not having in fact received them, the defendant Harms, with the Home National Bank, must prorate with plaintiffs their proportionate share of this amount, from the proceeds of sale of the mortgage property.

The bill in this case, so far as the right of way advancements are concerned, is based upon the supposed fact that plaintiffs have a first lien upon the right of way and road-bed situated thereon, which was part and parcel of the mortgaged premises, for such advancements made, though the prayer is for a first lien upon the entire mortgage premises.

The decree of the lower court, however, instead of giving the complainants a first lien upon the right of way and road-bed, in effect increases the mortgage indebtedness by the sum of \$20,468.40, and gives the appellees a lien therefor co-equal with the original and actual mortgage debt, upon all the property of all kinds covered by the mortgage, so that appellees, instead of getting a first lien upon a specific portion of the mortgaged property contributed by them, as claimed in their bill, get a joint lien with the holders of the other mortgage indebtedness on the entire property.

KNICKERBOCKER & SMITH, attorneys for appellant, Henry Harms.

WINSTON & MEAGHER, attorneys for appellant, The Home National Bank; FLETCHER CARNEY and SILAS H. STRAWN, of counsel.

J. M. RIGGS, attorney for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

The main controversy in this case arises over that portion of the decree of foreclosure of the Circuit Court which provided that out of the proceeds of the sale of the mortgaged premises the master should pay a *pro rata* sum of \$20,468.40 in equitable consideration of the fact that appellees were entitled to that many bonds of the railroad company, under the contract of April 24, 1894, and supplemental contract, June 8, 1894, with the Brown & Windsor Construction Company for procuring the right of way, and expenses incurred therein; that the said sum should prorate with the authorized issue of bonds to the amount of \$120,000, the same as though the first named sum had been an additional issue, and held by the appellees, thus in effect scaling down the amount that would be otherwise paid to the holders of the bonds actually issued in case the sale failed to produce enough to pay the entire amount foreclosed in this suit to the extent of the *pro rata* per cent of the claim for right of way and right of way expenses.

It is insisted on the part of the appellees that the decree can be sustained upon the ground that they had a vendor's lien on the right of way to the amount of its cost, and the expenses incurred and paid by appellees, and although the basis of the decree was not on that theory, yet the amount they would receive would be less than they were entitled to on the proper basis.

We need not stop to inquire whether this position is based on proper grounds, as it will not be involved in the consideration of the case. We shall treat the claim as the bill did, as being one for a vendor's lien on the right of way. It appears from the abstract of the various right of way deeds that they were all procured by appellees and executed to the Galesburg, Etherly & Eastern Railroad Company, between and including the dates of April 26, 1894 and August 18, 1894, except one deed dated June 1, 1895, and of the consideration of \$135. Something over two-thirds of the

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entire amount of \$15,351.80 was paid out, and the deeds procured prior to June 6, 1894, and the balance after that date.

The deeds in question were not handed over to the railroad company as they were obtained, but were retained by the appellees and were produced at the hearing and were ordered by the court in its decree to be turned over.

The building of the railroad by Harms was commenced immediately after the date of his contract of May 4, 1894, and completed October 27, 1894, and the bonds delivered to him in accordance with his contract as collateral security.

The bonds held by appellee have been sold and bought in by them under the provisions of their contract, and the Home National Bank and Henry Harms are the owners of the bonds not held by appellees. The Home National Bank became the owner of its forty bonds for money advanced to the Brown & Windsor Construction Company.

The lien claimed by appellee is not a lien by virtue of anything contained in the tripartite contract between them and the Galesburg Coal Company and the Brown & Windsor Construction Company, or the supplement thereto, but if a lien at all, is one created by the equitable principles of the law. It is not a statutory lien under any provision of the statute.

Under certain circumstances a vendor's lien is created as between the vendor of real estate and the vendee where no intervening interests come in.

It is not a lien very much favored by law but is often enforced in equity. Whether or not such a lien will be enforced in any given case, depends so entirely upon the facts involved that no general rule can be very well laid down that will cover every kind of a case. As between vendor and vendee alone there can be no question but that a lien would be sustained, but as between that lien and a mortgage lien the latter is generally preferred.

In the case of *Fisk v. Potter*, 2 Abb. App. Dec. 138, it is laid down as a general rule, that where two liens accrue at the same instant of time, and it becomes a question which of the two has superiority (the one a constructive one only

arising out of a secret trust by operation of law or based upon the ground of its being a natural equity connected with the consideration of the property purchased, the other arising from a specific legal lien based upon written contract and matter of public record), the preference will be given to the latter. The facts in the latter quoted cases are not precisely as they are in this case, but the principle above announced we regard as sound. In *Bagley v. Greenleaf*, 7th Wheaton, 46, Justice Marshall lays down the following rule: "A vendor relying upon this lien ought to reduce it to a mortgage so as to give notice to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public by an act which exhibits the vendee as the complete owner of an estate upon which he claims a secret lien. It would seem inconsistent with the principles of equity and with the general spirit of our laws that such a lien should be set up in a court of chancery to the exclusion of *bona fide* creditors."

The Supreme and Federal Courts of the United States hold a mortgage lien good as against equitable liens in favor of the claimants for claims for original construction, rails, frogs, etc., rental of leased lines, claims for rolling stock, salaries of officers, lost goods and sureties on appeal bonds.

Liens are sometimes allowed for wages performed for the railroad in producing its income, or "going expenses," as it is sometimes called.

We think all the circumstances show that they did not intend, when they entered into the contract of April 24, 1894, to retain a vendor's lien on the right of way which they undertook to procure for the railroad company, and the outside circumstances and relationship of all the parties but strengthens this supposition.

The appellees were owners of the entire stock in the Galesburg Coal Company as appears from the evidence of R. W. Frost, who testifies that on April 24, 1894, Robert Frost's Sons, S. L. Charles and W. H. Bates were the owners and holders of the capital stock of the Galesburg Coal Co., of Galesburg, Ill., that is, it was held by different members

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of the firm, not as a firm, but it was held by six individuals, four of whom composed the firm, and those were the Frosts who succeeded to the rights of Charles and Bates.

There was also another project on hand and that was to lay out a town site on the lands owned by the Frosts which they were to sell by the terms of the contract, or a portion of it, at \$60 per acre to the Brown & Windsor Construction Company, which company was to have a four-tenths interest therein.

It was therefore a great personal interest, or supposed to be, to Frosts, appellees, to have the railroad built as projected, otherwise the coal mine could not be developed nor the town built.

The contract of April 24, 1894, signed by the appellees as the party of the third part, as also the contract to appellant Harms and Spikings, were both entered into and signed prior to the issuing of the first mortgage bonds in question; but, no doubt, under the circumstances, all parties knew what bonds were to be issued because the bonds were provided for in the two contracts, and it must have been known that they were to be issued, otherwise they would not have been mentioned.

Under the contract signed by appellees the Brown & Windsor Construction Company agreed to construct the railroad and depots and purchase a locomotive and such other equipment as might be necessary, and the appellees and Bates and Charles, whose rights they have succeeded to, agreed to furnish the money necessary to purchase the right of way and condemn it where it could not be purchased, and the title to the right of way was to rest in the railroad company, and to guarantee the contract of the Brown & Windsor Construction Company with the Illinois Steel Company for the purchase of the rails to be used in the construction of the railroad, not to exceed \$30,000; and was to receive and did receive eighty of the bonds and the entire stock of the railroad company.

The right of way and steel rails were thus only provided for, and all the balance of the expenses and costs of building

the railroad must be furnished by the Construction company.

And how was the Construction company to procure the money and build the balance of the road? Manifestly, it must be out of money procured by the sale of the railroad bonds, which must have been contemplated would come into its hands from the railroad company, and which did actually come into its hands, as shown by the subsequent contracts and proceedings.

These appellees must have understood this, as it is a legitimate conclusion from all the evidence and from a consideration of the various contracts. Appellees agreed with the Construction company to furnish the money and to procure the right of way, and take bonds as collateral security at seventy-five cents on the dollar, and there was no provision in the contract that they were to retain a lien of any kind.

Appellees, no doubt, perfectly understood that the railroad company must have the right of way clear before it could issue any bonds that would be salable, and must have known that these bonds would be put on the market for sale, and that the purchasers would expect to get a clear title to the railroad right of way and franchise for their security; therefore they were, no doubt, willing to accept the responsibility of the Construction company under their contract for their reimbursement for the money to be furnished for the right of way.

The Construction company and the railroad company were separate and distinct organizations, and as to the contract in question between appellees and the Construction company, the railroad company had no privity, so far as the evidence discloses.

We must suppose, however, that the Construction company received some consideration for its undertaking to furnish the railroad company with the right of way, and that was, no doubt, the secret of its agreement with appellees to furnish the right of way to the railroad company, and the railroad company was required to do nothing.

It did, however, issue the bonds contemplated, mortgaging the right of way secured and to be secured.

Under these circumstances, whenever the deeds were made out and executed by the owners of the land for the right of way, and paid for by the appellees, being in the name of the railroad company as grantee, the contract was contemplated and the title vested in the railroad company, the transaction amounted to a delivery of the deeds to it, and the mortgage immediately attached free of any incumbrance of a vendor's lien. And the retention of the right of way deeds, on the part of appellees, without any authority by their contract so to do, made no difference as between them and the railroad company and the mortgage bondholders, and no record of the deeds was necessary to pass the title.

A deed without being recorded, if delivered to the grantee or some one for him, passes the title as effectually as though it were recorded. The appellees were the mere agents of the Construction company by virtue of their contract with it to procure the conveyances of the right of way to the railroad company, and having accomplished that, the title passed free of any vendor's lien.

The appellees knew very well that the mortgage would attach to the right of way as soon as the deeds were executed and that the railroad company was under no obligation to fulfill the contract of the construction company.

By the terms of the contract, and especially the supplemental contract of June 5, 1894, it was not contemplated that the railroad bonds should be delivered to the appellees to secure them in the advancement of the right of way money upon the procurement of the right of way deeds, because the supplemental contract provided that "in the future and as soon as it can be done," there should also be deposited with and assigned and delivered to appellees an additional amount of the said railroad bonds sufficient, at seventy-five cents on the dollar of their face value, to equal the money paid out for the right of way.

It will be seen that at this time over two-thirds in value of the deeds for the right of way had been procured, placing the title thereof in the railroad company, and afterward,

knowing that the Construction company could not then deliver the bonds according to the contract as originally made, procured the balance of the right of way at a cost of over \$5,000.

The procuring of the deeds and the delivery of the contemplated railroad bonds, were not required to be a contemporaneous act, and the non-delivery of the bonds was not to delay the procurement of the deeds.

It is insisted by counsel for appellees that the words "as soon as it can be done," referring to the delivery of the bonds, meant as soon as the total amount of right of way could be ascertained.

We do not think this is a fair construction of the clause. It is broader. It refers to any cause of delay, and a significant fact is that after delivering the eighty bonds to appellees, the Construction company had hypothecated, by contract or otherwise, all the remaining issue to appellant Harms and Spikings, and the Home National Bank.

We think it is a fair inference that appellees knew that fact and were willing to wait for their redemption by the Construction company so that they could be delivered.

We do not think, however, that this is a vital point in appellant's case.

In addition to those facts and circumstances, Harms and the railroad company and the Construction company were allowed to take possession of the right of way and spend their money in the building of the road, and The Home National Bank to furnish its money on the security of the railroad bonds.

During all this time appellee made no protest or claim of any vendor's lien.

It would be inequitable now to allow them to set up such a claim.

It is insisted that, as the right of way deeds were not of record, the appellants purchased the railroad bonds at their own peril; but even if this be so, the appellants would only be held to notice of what they might have learned upon diligent inquiry, and an inquiry would only have resulted in

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ascertaining the facts as they actually existed at the time, and that would not defeat the attaching of the railroad mortgage or trust deed to the right of way.

We find these facts from the evidence: That it was the actual intention of appellees, at the time their contract and supplemental contract were made, to furnish the money and procure the right of way and place it in subordination to the lien of the first mortgage bonds; and it was their intention to accept the obligation of the Construction company for their security, and to not hold any lien on the right of way as against the mortgage.

They can not, therefore, be allowed to interpose any claim for a vendor's lien against the holder of the mortgage bonds actually issued.

Their claim for the money advanced for the right of way and expenses must be regarded as an unsecured claim as against the mortgage sought to be foreclosed in this suit, and such claim is not entitled to be paid out of the proceeds of the sale to be made under a decree for the payment of the mortgage bonds in question.

If any surplus should remain after paying the mortgage bonds and costs of foreclosure and sale, such surplus will remain in court to be distributed, according to equity and justice, to the parties entitled to it.

For the errors above noted in the decree, allowing appellees to share in the payment of their claim for right of way, disbursements out of the proceeds of the sale ordered in the decree, and not holding the mortgage bonds a paramount lien to all others, the decree of the court below is reversed and the cause remanded, with direction from this court to the Circuit Court to render a decree in accordance with this opinion, and to reject the claim of appellees for reimbursement out of the proceeds arising from the sale to be ordered for the payment of the first mortgage railroad bonds.

People of the State of Illinois v. Joseph Cook and W. T. Shawley.

1. **RECOGNIZANCE—Defined.**—A recognizance is an obligation of record, entered into before a court or officer duly authorized for that purpose, with a condition to do something required by law, which is therein specified.

2. **SAME—Requisites of the Obligation.**—To be valid the recognizance must be taken before a court or officer duly authorized, and if taken before one justice of the peace, where the statute requires two, it will be void.

Scire Facias, on a forfeited recognizance. Appeal from the Circuit Court of Warren County; the Hon. **HIRAM BIGELOW**, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

MAURICE T. MOLONEY, Attorney-General, and **CHARLES A. McLAUGHLIN**, State's Attorney, for appellant; **T. J. SCOFFIELD** and **M. L. NEWELL**, of counsel.

GRIER & STEWART, attorneys for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a proceeding upon a *scire facias* issued by the clerk of the Circuit Court of Warren County, July 1, 1895, returnable to the next September term, against Joseph Cook, M. Cook and W. T. Shawley, citing them to appear and show cause, if any they could, why execution should not be issued against them, being the penalty expressed in a recognizance entered into by Joseph Cook as principal, and M. Cook and W. T. Shawley as sureties. The *scire facias* was demurred to by M. Cook and W. T. Shawley, and the demurrer was sustained by the court, and they were discharged from liability on the bond and judgment rendered in their favor for costs.

From that judgment an appeal is taken to this court.

The record shows that on May 4, 1895, Joseph Cook and William Robinson were arrested and brought before John

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M. Turnbull, a police magistrate, charged with the crime of burglary.

Joseph Cook waived examination and was committed to jail, for want of bail in the sum of \$500.

On the 7th day of May he was brought out of jail before the said John M. Turnbull, police magistrate, and released from custody upon appellees signing the recognizance in question. No other justice sat with the police magistrate taking the recognizance.

The police magistrate undoubtedly had jurisdiction, undoubtedly had the right in the first instance to fix the amount of bail Cook should give, and to commit him to jail for the want of bail, but the question arises, on this record, whether he had a right to release Cook, without the concurrence of another justice, in the manner he did. The statute prescribes the mode and manner in which a person committed to jail on a criminal charge for want of bail may be released. Section 6 of Division 3 of the Criminal Code, Section 299, Hurd's Revised Statute, provides as follows: "Where any person shall be committed to jail on a criminal charge for want of good and sufficient bail (except for treason, murder or other offense punishable with death), or for not entering into a recognizance to appear and testify, any judge or any two justices of the peace may take bail or recognizance in vacation and may discharge such prisoner from his imprisonment."

It will be seen from the record that Turnbull, the police magistrate, acted alone in this instance in taking the recognizance and discharging the prisoner, Cook, and that he failed to follow the statute above quoted.

It is contended by counsel for plaintiff in error that although the statute was not followed, and although only one justice acted, that the recognizance was entered into by the defendants in error voluntarily, and is therefore good, and that they should be estopped from denying its validity.

A recognizance is defined to be "an obligation of record entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by

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law which is therein specified." 2 Bouvier's Law Dictionary; Bacon et al. v. The People, 14 Ill. 312.

From the above definition it will be seen that a recognizance, to be valid and binding, must be taken before a court or officer duly authorized. It would, therefore, follow that a recognizance taken before a court or officer not duly authorized would be void. And in this case the recognizance was taken before one justice where two were required by statute; therefore the one justice had no more authority to accept bail than any indifferent person. All of which clearly appears of record.

The exact case presented by this record has not, probably, been passed upon by the Supreme Court of this State, but the higher courts of other States in similar cases to this have held that a bond taken by an unauthorized officer is neither good as a statutory bond nor as a common law obligation. Dickenson et al. v. The State, 29 N. W. Rep. 184, 20 Nebraska, 72; see also The State v. Clark et al., 15 Ohio, 595; also Powell v. The State of Ohio, 15 Ohio, 579. The case of The People v. Meachem, 74 Illinois, 292, cited by counsel for plaintiff in error, does not appear to be the same in principle. The justice had jurisdiction and was held to be a *de facto* officer, hence his acts were valid; and none of the other cases cited by appellant do we regard as being analogous in principle.

We are satisfied that the decision of the Circuit Court in sustaining the demurrer to the *scire facias* was correct.

The judgment of the Circuit Court is therefore affirmed.

Blandina M. Elting et al. v. The First National Bank of Biggsville et al.

1. CHANCERY JURISDICTION—*Administration of Estates*.—While County Courts in this State, sitting as courts of probate, have power to grant equitable relief in many cases, and to adjudicate the great majority of cases affecting the administration of estates, still a court of chancery may, in the exercise of its general jurisdiction, take upon itself the ad-

68	204
173	368
68	304
89	450

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ministration of an estate and will do so in all cases where the Probate Court can not give adequate relief.

2. *SAME—Will be Retained for all Purposes when Properly Acquired.*—When a court of chancery has once properly acquired jurisdiction of a case it will retain that jurisdiction and do complete justice between the parties, although it may be necessary to pass upon matters which alone would not be cognizable in a court of equity.

3. *ADMINISTRATORS—Purchasing at Their Own Sale—Creditors may Complain.*—In a case where an heir or devisee of a deceased person is the administrator or executor of his estate, and a sale of real estate is made to him which is voidable, because of his fraud, a creditor whose rights have been prejudiced may invoke the aid of a court of equity and have the sale set aside, or the money realized from a subsequent sale declared to be held in trust for the payment of claims.

Bill, against an administrator for relief. Error to the Circuit Court of Henderson County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

STATEMENT OF THE CASE.

On the 29th of March, 1885, Cornelius D. Elting died, in Henderson county, Illinois, leaving a personal estate of over \$12,000, about seven hundred acres of valuable farm lands in Illinois and a section of land in Iowa. He left neither widow nor children. He devised by will all his estate, real and personal, after payment of debts, to his sister, Blandina M. Elting, of Orange county, New York, and named her and William L. Cuddeback as executors.

Cuddeback declined to accept the trust, but the sister coming on from New York immediately after the death of her brother, and taking up her residence at his home in Illinois, did accept, and letters were issued to her by the County Court of Henderson County, April 29, 1885.

At the time of his death deceased was heavily in debt; some of the indebtedness was secured by chattel mortgage on the most of his personal property, while other of his indebtedness was secured by mortgage upon his Illinois and Iowa lands.

After ascertaining the involved condition of the estate, the executrix returned to her home in New York, leaving

the entire settlement of the estate to a brother, Philip B. Elting, also a resident of New York, who, with another brother, Lewis B. Elting, had come on with her from that State.

A portion of the personal property was sold at private sale, and an order made by the County Court to sell the remainder of it at public sale. The greater portion of it was sold under that order, but the horses and farming implements were not so sold, but were used for farming the land on the executrix' own account, as were also oats and corn for seed and feed.

There was not sufficient personal property to pay indebtedness that had been probated, and in March, 1887, a petition was presented to the County Court, in the name of the executrix, for an order to sell the Illinois lands to pay debts. On the 21st day of that month an order was granted by the County Court for a sale of the land. It was advertised for sale in her name and on the 15th of April, 1887, her brother Philip bid off, in his own name, 500 acres and one town lot for \$2,781.50. N. O. Tate and Charles Torrence bid off the undivided half of another tract for \$320. Deeds were immediately made to all the purchasers.

Philip did not pay the amount of his bid on the day of sale but borrowed \$11,383.95 of Robert Moir & Co. and secured the same by mortgage on three of the tracts bid in, and redeemed them from sales under mortgage foreclosure before them, paying therefor \$11,832.15.

On the 18th of July, 1887, he sold the right of way over 20 acres of the lands bid in to a railroad company for \$312.05, and on the 10th of December, 1887, he sold to one Charles Nelson 80 acres for \$2,600, taking from him note and mortgage for sum of \$2,282 and balance in cash. The Nelson note and mortgage he assigned to Moir & Co. taking credit for the same on the mortgage debt which they held against him.

Tate and Torrence bought the remaining undivided half of the eighty-acre tract, the undivided half of which they had bid off at the sale and sold the entire tract to Philip. This

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tract Philip mortgaged to Moir & Co. to secure \$2,000 December 22, 1887.

On the 4th of January, 1888, Philip conveyed to his sister, the executrix, all the land he had purchased at the sale and the lands procured from Tate and Torrence, for the express consideration of \$10,400, subject to the two mortgages he had given to Moir & Co.

There was a partnership between the deceased, at the time of his death, and one Benjamin Warren, Jr., engaged in buying and selling grain at Scioto, Ill., which business was settled by the survivor and the attorneys of the executrix in such way as to fix an indebtedness against the estate in favor of the surviving partner of \$192.71.

There was also a partnership between the deceased and one U. T. Douglas, in the elevator and grain business; Philip, acting for his sister, procured Douglas to sell the interest of deceased to N. O. Tate, who gave in exchange eighty acres of land in Fulton county, Ill. This land was conveyed to Blandina M. Elting in consideration of \$1,600 subject to a mortgage in favor of F. C. Neil for \$600. She charged herself with \$400, received from Douglas in full settlement of the partnership, and afterward, on the 30th of March, 1889, conveyed the land to one Wilson Rector for \$1,700.

On the 4th of December, 1889, she conveyed one quarter section of the land which was knocked off to her brother at the public sale ordered by the County Court, and which was afterward, conveyed to her, to Mary S. Caldwell for \$8,000. To the same grantee she, at another time, conveyed another quarter section of said land for \$6,650. The land obtained through Tate and Torrence she conveyed to Emma Riggs for \$6,800, \$1,000 of which was paid her in cash, and \$5,800 was secured by note and mortgage, which she subsequently assigned to her nephew, William L. Cuddeback.

After Philip had been managing the affairs of the estate over a year, he, without returning to New York, procured letters as executor of the estate of his mother, who had died

in that State eighteen years before; then, and as such executor, cited his sister, as executrix of the estate of Cornelius D. Elting, to appear before the Surrogate Court of Orange County, New York, and render an account of the doings of her testator while he was acting as executor of his mother's estate. The result of that proceeding was a decree of that court requiring her, as executrix of Cornelius D. Elting, to pay to Philip \$6,174.21. On the 6th of April, 1887, the executrix still remaining in New York, a year having passed after adjustment day, and her appearance having been entered by attorneys, a judgment was allowed by the County Court of Henderson County on that transcript for \$6,164.21 as a claim of the sixth class against the estate.

On the judgment so obtained Philip redeemed from a mortgage sale before then made of the W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, Sec. 30, T. 8, N. 3 W., in Warren county, and said land was sold and bid in by Philip for the redemption and a deed made to him. He paid for redemption \$2,106.91, and shortly after sold the same land for \$2,800.

On October 18, 1887, letters were issued to one W. B. Quarton, in Kossuth county, Iowa, on the estate of Cornelius D. Elting, that being the county where the Iowa land was situated. Claims were there allowed by consent of Quarton to amount of \$12,000. Among them was the above mentioned claim of Philip Elting as executor. The other claims were filed by Blandina and the Cuddebacks. The section of Iowa land was sold under a decree of the Iowa court.

The claims allowed against the estate by the County Court of Henderson County amounted to about \$11,000, exclusive of the claim of Philip B. Elting, executor of Anna M. Elting. About \$2,000 of them were claims of the first, fifth and sixth class, and about \$9,000 of the seventh class.

None but first and fifth class claims, which amount to \$246, have been paid.

In December, 1892, creditors who had probated their claims, but had not been paid, began this suit in chancery, praying that the judgment allowed by the County Court in

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favor of Philip B. Elting, executor, etc., be annulled; that the purchase of Philip at the public sale of the lands be declared fraudulent; that both he and Blandina M. Elting be required to account for all made by them on a resale of the lands; that a judgment be rendered against the sureties on her bond as executrix; that Mary S. Caldwell and Emma Riggs be ordered to pay into court balance due on their purchase of lands for her, and that the accounts of the executrix be corrected, etc.

Upon a hearing the Circuit Court set aside the judgment allowed in favor of Philip B. Elting, executor, etc., ordered that he and Blandina M. Elting account for all they had made out of the real estate of the deceased, that a statement of her account as executrix be made, and that the case be referred to the master to restate the account.

KIRKPATRICK & ALEXANDER, attorneys for plaintiffs in error.

BASSETT & BASSETT, attorneys for defendants in error.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted for the purpose of reversing a decree of the Circuit Court of Henderson County, setting aside the order of the County Court of said county, allowing a claim of \$6,164.21 in favor of Philip B. Elting, executor, etc., against the estate of Cornelius D. Elting; ordering the said Philip B. Elting and Blandina M. Elting to account for all money made by them on the sale and resale of certain lands of which Cornelius D. Elting died seized, with certain rents made thereon, and ordering a restatement of the accounts of Blandina M. Elting, as executrix of the estate of Cornelius D. Elting.

The decree was rendered at the suit of creditors holding unpaid claims to the amount of \$10,000, which had been allowed against the estate of Cornelius D. Elting by the County Court. Equitable interference and relief was sought

by them upon the ground that the executrix and her brother had fraudulently and collusively managed the affairs of the estate, and had so made way with the property as to leave nothing with which to pay off the complainants' claims.

The first point of contention raised by counsel for the plaintiffs in error is one of jurisdiction. They insist that the County Court was clothed with ample power to correct any order erroneously made concerning the administration of the estate, to compel a restatement of the accounts of the executrix, and to make any order for the relief of creditors which would fall within the case presented by the bill of the defendants in error; and having first acquired jurisdiction, could not be ousted of it by the interference of a court of chancery.

While the jurisdiction and power of Probate Courts in this State have from time to time by legislative enactment been enlarged and extended, and our Supreme Court has gone far to maintain them in granting equitable relief on many questions affecting the administration of estates, still chancery jurisdiction exists in all cases where the Probate Court can not grant adequate relief. *Townsend v. Radcliffe*, 44 Ill. 446; *Winslow v. Leland et al.*, 128 Ill. 304; *McCreary v. Meyer*, 64 Ill. 495; *Cohen v. Menard*, 136 Ill. 130.

The chief ground on which a court of equity should take jurisdiction of this case is the fraud and collusion charged against the executrix and her brother in selling and disposing of the real estate for her benefit. We regard the manipulations by which she, through her brother, procured the sale of the real estate and the subsequent vesting of the title in her as fraudulent and a breach of trust. While there are a number of matters adjudicated upon in this case in which the County Court could have given adequate relief, yet having rightfully acquired jurisdiction upon the ground above mentioned, the Circuit Court had jurisdiction to pass on all questions mooted between the parties. That is done in the interest of justice in all cases where a court of chancery acquires jurisdiction, although it may involve passing

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upon matters not by themselves cognizable in a court of equity. *Poole et al. v. Docker et al.*, 92 Ill. 501; *Stickney v. Goudy*, 132 Ill. 213.

We do not care to extend this opinion to the length which would be required in discussing in detail the very numerous findings on which the decree was based. We are content to say that the evidence abundantly satisfies us that the executrix colluded with her brother for the purpose of having the lands sold at public sale, at which he should become the purchaser, or so manipulating subsequent sales as to vest the title in her. We do not think the sale should be held fraudulent for the reason alone that Philip was her general agent in winding up the affairs of the estate, and that when he bid off the land it should be regarded as her bid. The conduct of the two parties, all taken together, leads us to the conclusion that it was their common purpose to so dispose of the effects of the estate as to appropriate as much of it to their own use as possible and leave unsecured creditors not paid.

The right of a creditor to attack such a sale is on the ground that the executor or administrator, through another, was the purchaser in question. It is insisted that as the heir succeeds to the land and the creditor has no interest other than in the fund arising from a sale of it by the representative, that in a case where the representative has purchased at his own sale he can not be held to be a trustee of the creditor. While it is true that in all the reported cases from our Supreme Court, where such sales have been held fraudulent and voidable they have been held so at the suit of heirs, we are of the opinion that in a case where the sole heir or devisee is the administrator or executor and the sale is held voidable because of his fraud, a creditor whose rights have been prejudiced, may invoke the aid of a court of equity to the extent of having the sale set aside or the money realized out of a subsequent deal of the land declared to be held in trust for the payment of his claim.

We approve the action of the Circuit Court in finding

that the allowance of the preferred claim for \$6,164.21 in favor of Philip B. Elting, executor of the estate of his mother, Anna M. Elting, was obtained by the fraud and connivance of Philip and Blandina. The mother had been dead nearly twenty years. Cornelius D. Elting had a continuous residence in Illinois of fifteen years before his death. He was a large holder of property, both real and personal. Two years after his death and seventeen years after he had left New York, Philip, the manager of his estate in Illinois and a resident of Illinois, procures himself to be appointed executor for his mother's estate in New York, has Blandina, without being appointed executor in that State, appear before the Surrogate Court of Orange County, New York, and such proceedings were had that a judgment was entered against her as executrix of Cornelius D. Elting for \$6,164.21. Under the circumstances the Circuit Court was warranted in finding that the claim was fictitious, and in decreeing that its allowance here was void.

The court rightfully decreed that Emma Biggs should not pay to Blandina or William L. Cuddeback the balance of the purchase money for land, owing by her, and that they be enjoined from attempting to collect such purchase money until after an accounting was had and the further order of the court made.

The case now stands on reference to the master in chancery to take evidence and restate the account.

There are several matters discussed in the briefs, concerning which further evidence may be heard, and it is not necessary that we express our views upon them. After the master presents his report the court will make such final orders as to him may seem meet and equitable.

As to such matters appearing in the findings and decree as are final we affirm. Decree affirmed.

68	213
160	142
68	213
e115	1553

Patrick Scanlon v. Benjamin Warren, Sr., and Benjamin Warren, Jr., partners as Warren & Co.

1. **OPTION CONTRACTS—*The Intention of the Parties.***—In a suit on a contract which is defended on the ground that trades made in pursuance of the contract were violations of the statute against options, it is proper to refuse to allow the defendant to testify as to his intention when he made the contract. In such a case one party to the contract would not be affected by any secret intention of the other party, unless he knowingly participated in it.

2. **SAME—*What are Not.***—By the rules of a Board of Trade, a purchaser of grain could make sales of as much grain as he had purchased, and the member of the Board of Trade making the sale or purchase would take the burden upon himself to see that the grain, when delivered on the first purchase, should be immediately turned over on the second purchase. *Held*, that the members took this responsibility as agents of the purchasers, the purchasers not being able to deal on the board of trade themselves, and that the provision could not be construed as granting an option to parties to receive or not to receive grain purchased.

3. **SAME—*Burden of Proof.***—Where a suit on a contract was defended on the ground that sales made under the contract were violations of the statute against options, the burden of proof is upon the defendant to show that the contract was within the inhibition of the statute, or that the plaintiff was guilty of an intention to violate the statute by his dealings under the contract.

Assumpsit, on the common counts. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1893. Affirmed. Opinion filed December 9, 1896.

McCULLOCH & McCULLOCH and DAN R. SHEEN, attorneys for appellant.

STEVENS, HORTON & ABBOTT and GEORGE B. FOSTER, attorneys for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was the same case that was in this court on a former appeal by appellees, and our decision in the case will be found in 59 Ill. App., on page 133.

This court reversed the judgment of the court below, which at that time was in favor of the appellant here, mainly upon the facts of the case, holding that the facts in the case were not sufficient to sustain the finding of the court below on the evidence.

As will be observed, by reading the opinion in that case, the issues and evidence were substantially the same as on this trial.

The claim of the appellee here was for money advanced for appellant, on an agreement between them for the appellee to advance money for appellant to deal on the Board of Trade in Chicago, in wheat and corn, and the appellant failing to furnish the money, appellee was compelled to and did furnish to appellant large sums to pay losses on wheat bought by appellees as agents of appellant on the Board of Trade.

The appellees were not members of the Board of Trade in Chicago, and had no interest in the dealings between the members of the Board of Trade and appellant, but were residents of Peoria, Illinois, carrying on a grain commission business in the latter city; and appellant was also a resident of Peoria, and was a wealthy man, and made a contract along in February, 1892, with the appellees to buy grain for him and advance money, and they were to receive seven per cent interest for such advances.

The advances were made in accordance with the agreement, and paid for appellant on losses he sustained on the Board of Trade in Chicago.

The advances were generally made before, and none after, the dates appearing in the statement of account.

The statement of account which was attached to the declaration is as follows :

The losses on these wheat transactions are as follows :

Ex. 83.	5,000 bu. bo't November 23, sold May 19, 1892.....	\$942.03
Ex. 84.	5,000 bu. bo't November 25, sold May 19, 1892.....	866.89
Ex. 85.	5,000 bu. bo't December 28, sold May 19, 1892.....	691.89
Ex. 86.	5,000 bu. bo't February 28, sold May 24, 1892.....	412.58
Ex. 87.	5,000 bu. bo't March 1, sold May 24, 1892.....	856.80
Ex. 88.	5,000 bu. bo't February 1, sold May 25, 1892.....	812.55
Total on May, 1892, wheat....		\$3,582.84

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Ex. 40.	5,000 bu. bo't May 25, sold July 28.....	\$298.62
Ex. 41.	5,000 bu. bo't May 24, sold July 29.....	266.51
Ex. 42.	5,000 bu. bo't June 1, sold July 29.....	69.64
Ex. 43.	5,000 bu. bo't May 24, sold July 29.....	266.50
Ex. 44.	5,000 bu. bo't May 19, sold July 30.....	253.75
Ex. 45.	10,000 bu. bo't May 19, sold July 30.....	545.51
	Total on July wheat.....	\$1,595.58
Ex. 47.	10,000 bu. bo't July 29, sold September 2.....	\$370.00
Ex. 48.	15,000 bu. bo't July 31, sold September 1.....	573.75
Ex. 49.	5,000 bu. bo't July 28, sold September 1.....	172.50
	Total on September wheat.....	\$1,116.25
Ex. 50.	30,000 bu. bo't September 1 and 2, sold October 1...	
	Total October wheat.....	\$678.73
Ex. 51.	30,000 bu. bo't October 1, sold December 1.....	
	Total December wheat.....	\$1,410.00
Ex. 52.	30,000 bu. bo't December 2, sold April 8.....	
	Total for May.....	\$622.50
Ex. 53.	35,000 bu. bo't April 3, sold June 30.....	
	Total July.....	\$3,297.50
	Total loss on 30,000 bu. wheat.....	\$12,302.85

The balance of the account, after allowing appellant all just credits, was the amount of the verdict in this case, \$12,230, upon which the court below rendered judgment. The verdict and judgment included the interest.

The purchases of wheat made by appellees for appellant were for May delivery, and made in 1891, and the February purchases were made in 1892, and amounted to 30,000 bushels, and it was kept for appellant until June 30, 1893, and appellees paid the bills of loss.

It was carried part of the time as cash wheat in the elevator at Chicago, but most of the time in the way of purchases for future delivery.

L. Everingham & Co. were the commission merchants who did most of the business for appellant on the Board of Trade in Chicago.

The money claimed in this suit is for the money lost on the 30,000 bushels of wheat first purchased.

All the purchases and sales were an attempt to "carry" the 30,000 bushels first bought.

The evidence tended to show that appellee was authorized to use his own judgment in "carrying" the grain for

appellant, and that he "carried" just the same that he would have done had it been his own. It was finally sold on the 30th day of June, 1893.

The panic was then on, and it would be delivered the next day, July 1st. Everingham & Co. could not pay for it and appellees could not, so they sold it, and appellees notified appellant of the sale right away. They carried the wheat as long as they could. It was in the midst of a serious panic and the money could not be secured at any rate of interest, and it was impossible to get it.

The wheat market, from the time they made the first purchase, then being at one dollar and one cent per bushel, was declining, except at intervals when there would be advances, and at no time was the market such that the wheat could be sold out without loss, and appellees' instructions from appellant were to sell when a sale could be made without loss, and appellant was receiving reports of the market right along.

The corn was sold without a loss to appellant, and an account of all the sales was sent to appellant by mail. The defense was based upon two propositions: That the sales and delivery of the wheat was a violation of the statute against options, and the second that they were gaming contracts at common law and that the sale of 30,000 bushels of wheat on the 30th of June was unauthorized. The question of fact as to whether these were gaming contracts as between appellant and appellee we will not again discuss.

This was entirely a question of fact for the jury, and we think the evidence was sufficient to justify the verdict in that particular, as well as to the authority of the appellees to sell the 30,000 bushels of wheat June 30, 1893.

On the former appeal we reversed the judgment of the court below based substantially on the same evidence, mainly because the finding of the court was against the weight of the evidence, it being then in favor of the appellant.

After a perusal of the evidence in this case we find no reason to change our opinion.

It is complained that the court erred in refusing to allow appellant to testify as to his intention when he employed

appellees to make the purchases and sales for him, whether he intended them as mere gaming contracts or whether he intended to deal in a legitimate, *bona fide* manner, and to actually receive and pay for the wheat he purchased and to actually deliver the wheat which he sold.

We think that the court properly ruled in rejecting this evidence. As between himself and appellees, appellees could not be affected by any secret intent of appellant unless they knowingly participated in it, and the only question for the jury was, under the evidence, as to whether the transactions, as carried on, were legitimate, and the secret intent of the appellant would throw no light upon it as far as the appellees were concerned. And the instructions on the same line that were offered and refused were properly refused.

As to instructions refused, informing the jury that they had a right to find facts from circumstantial evidence, they were not improperly refused. First, because the jury was instructed on that point, and second, the most, if not all, were misleading in their structure and some of them called attention to particular facts which would have had a tendency to mislead the jury.

The first, second and third of appellees' given instructions are not erroneous. We think there was no error in giving either of these instructions.

The first instruction ignores the fact (as is claimed) that the contracts themselves on the Board of Trade leave an option open to either party to receive or not to receive, to deliver or not to deliver, the grain. We do not understand that the proof tended to show any such option with the Board of Trade.

According to the rules of the Board of Trade a purchaser of grain could make sale of as much grain as he had purchased, and the member of the Board of Trade making the sale or purchase would take the burden upon himself to see that the wheat when delivered on the purchase should be immediately turned over on the sale. He simply took this responsibility as the agent of his employer, his employer not being able to deal on the Board of Trade himself. We do

not think such a rule could be twisted into an optional sale by any fair reasoning. If so, transactions under the rules of the Board of Trade would be in their nature *per se* gambling transactions, which we do not understand that any court has ever holden.

Instructions refused on this basis were, therefore, properly refused, and the refusal of the court to give appellant's sixth refused instruction framed on that basis was properly refused, there being no evidence on which to base it except the rules of the Board of Trade.

The giving of the third instruction for appellee was not erroneous in telling the jury that if either party contracted in good faith he is entitled to the benefit of the contract, no matter what may have been the secret purpose or intention of the other party. It is objected to this that while this would have been a good instruction as between buyer and seller it would have no relevancy as between principal and agent as in this case.

We are unable to see any distinction when applied to the facts of this case. Of course, the principal and agent as between the principal and a third party dealing with him through his agent, are held to the same knowledge and intent, but in a case like this, where the suit is based on a contract between the principal and agent himself to make contracts in behalf of the principal, and the contract which the agent is employed to make, in itself may be legitimate, and the agent makes it in good faith, it certainly would be a very unjust rule of law for the principal to avoid such contract on the ground that he had a secret intention that it should be a gaming one, and of which his employer had no notice, and as a matter of fact did not participate intentionally in carrying on an illegal transaction. The appellee would not be in such case *in pari delictu* with the appellant. He would not, therefore, be barred of his action. We are of the opinion there is no such law as contended for by appellant. If appellees made a contract with Everingham & Co., which was void under the statute, they might then be participants in an illegal contract which, no doubt, they would be responsible for, but in that case they could not be

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regarded as acting in good faith, as the instruction required them to do, but as we have said before, we see no legitimate evidence tending to show an option contract.

The second of appellees' given instructions was not erroneous, as will be seen from what we have said in regard to the first and third, and especially the third, as it covers substantially the same point.

The sixth of appellees' given instructions is complained of because the instruction throws the burden of proof to show that the appellees were guilty of an intention to violate the statute, upon the appellant; we think it was not erroneous.

Taken all together, this instruction seemed to be fair and according to law. Of course, if the appellees' evidence of itself showed that the contract was illegal there would be nothing in it to rebut; but as a general rule of law, the burden of proof is upon the defendant to show its illegality, and the latter part of the instruction makes it plain enough what is meant.

And the appellant's second and third instructions, and his instructions generally, base the decision of the case upon the preponderance of the evidence, taken as a whole; that of the appellees, as well as the appellant; and the jury could not possibly have been misled by the appellee's sixth instruction, even if some theory of preponderance of evidence had been violated by it.

We see no error in the giving or refusing of any other instructions. The case in all respects seems to have been fairly tried, and justice seems to have been done according to the law and evidence.

The judgment of the court below is therefore affirmed.

Albert Bayer v. The Chicago M. & N. R. R. Co.

1. *MASTER AND SERVANT—When the Relation Does Not Exist Between Employer and Employee.*—One who contracts to do a specific piece of work, furnishes his own assistants and executes the work, either entirely in accordance with his own ideas, or in accordance with a plan

furnished by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor and not a servant, and a person injured by his negligence in the performance of the work, has no right of action against the party for whom the work is being done.

2. *SAME—Employer not Liable for Negligence of Contractor.*—Where work is being done for a railroad company, under a contract, the fact that it retains the right to demand the discharge, under certain circumstances, of an employe of the person doing the work, does not make such company the principal or master so as to render it liable for the negligent acts of the contractor whereby injuries result to his employes.

3. *VERDICTS—When the Court Should Direct.*—When the evidence with all fair and legitimate inferences therefrom is so insufficient to sustain a verdict for the plaintiff that the court must set it aside if rendered, the court will be justified in directing a verdict for the defendant.

Trespass on the Case, for personal injuries. Error to the Circuit Court of Du Page County; the Hon. CLARK W. UPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

SETH F. CREWS and R. A. D. WILBANKS, attorneys for plaintiff in error.

W. J. KNIGHT, attorney for defendant in error.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Plaintiff in error brought an action on the case against defendant in error, to recover damages for injuries sustained by him in consequence of the fall of a bridge upon which he was at work on the line of defendant in error's railroad, across the north branch of Du Page river.

The cause was tried by a jury and after the evidence was all in, the trial court directed a verdict for the defendant, and this is assigned for error.

The defendant in error made a contract in 1887 with W. E. Dorwin & Co., for the construction of a portion of its railroad through Du Page county, whereby Dorwin & Co. agreed to furnish the necessary labor and material to complete the road-bed and structures for the reception of the ties and rails. It was provided that the work was to be done in

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accordance with the plans and specifications and directions of the engineer in charge of the work, by whom the measurements and calculations of the quantities and amounts of several kinds of work performed should be determined, and it was also provided that the engineer should have power to reject and condemn work or materials which, in his opinion, did not conform to the spirit of the agreement.

It was further provided that the several stipulations of the agreement should be performed in such a manner that W. E. Dorwin & Co. should not be relieved from the immediate charge and responsibility of the work.

The fourth provision of the contract was as follows: "If any foreman or laborer employed by the contractor shall, in the opinion of the engineer, execute his work in an unfaithful or unskillful manner, or in any respect prove remiss or inadequate to the performance of his duty, or disrespectful or riotous in his conduct, he shall forthwith, by direction of the engineer, be discharged, and no person shall be employed on the work, in the capacity of foreman or overseer, who has been previously discharged for either or any of the above reasons."

Dorwin & Co., by verbal agreement, sub-let the contract to do the wood work on fifteen miles of the line, to one Henry Fox, the latter to perform all the work and Dorwin & Co. to furnish the materials. Plaintiff in error was a carpenter employed by Fox to work upon the bridge in question, and after he had worked thereon about nine days, the bridge fell, carrying him down with it, and causing the injury complained of.

The bridge, or trestle, was about 150 feet long, having eleven bents, and was about forty-two feet high from the ground to the top of the stringers. The frame was built upon the ground, and, after the first bent was raised, a temporary brace was placed upon each side and a rope fastened to the rails and ties upon a temporary trestle some forty feet distant to the west. Then the tackle blocks were placed on the first bent and from this the others were raised. After the bents were all raised the girders were put on, and

then the stringers for the reception of the ties were placed upon the top. The bridge was intended for a double track. At the time of the accident, which occurred July 9th, the bridge was completed, except that these stringers were not accurately placed, nor were they bolted.

Plaintiff in error did all kinds of work about the bridge, and at the time of the accident was on the top, at the extreme east end of the trestle, and Fox, the sub-contractor who was the immediate employer of plaintiff in error, was at the other end working on the stringers. Plaintiff in error and his employer, Fox, and the other employes of Fox, arrived at the bridge about twelve o'clock, but waited until three o'clock for Mr. Nair, the resident engineer of defendant in error to come and give them the centers, so as to get the exact location for the stringers. In the meantime, plaintiff in error and John Fox (a son of the sub-contractor) took off this rope that extended from the first bent to the rails, and also took off the braces that were placed when the first bent was raised, thus leaving the bridge without supports, the embankments at the ends of the bridge not yet having been filled in. Mr. Nair, the engineer, went upon the bridge and located the centers for placing the stringers, and then went away, and about twenty or thirty minutes afterward the bridge fell, killing the sub-contractor, Fox, and severely injuring plaintiff in error.

There was a wind blowing at the time, at the rate of from eight to ten miles per hour.

The negligence complained of in the first count of the declaration is, that defendant in error willfully and negligently constructed said trestle bridge in an unsafe and improper manner; and in the second count it is alleged that "the defendant then and there willfully and negligently so improperly constructed said trestle bridge that the same then and there, without any fault of said plaintiff, fell with and upon the plaintiff" causing his injury.

The third count in substance alleges that plaintiff was employed as a common laborer upon the bridge belonging to defendant, and under the charge, control and superintend-

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ence of its officers and engineers; and charges that through their carelessness and negligence, they not being his fellow-servants, the bridge was so negligently managed and constructed that by reason thereof it fell with plaintiff and caused his injury.

The plan of the bridge, which was introduced in evidence, is what is known as "The Standard Plan" and was substantially the same as that used by most of the railroad companies throughout the country. The evidence shows that this plan was not in all respects followed by the contractors in the construction of the bridge. If it had been, in all probability the accident would not have occurred. The plan called for the boxing of the girts, that is, notches cut in the girts so as to form a shoulder, which should fit against the posts at either side. The plan also called for two bolts through the girts into the upright posts, but only one was used by Fox. The tenons did not fit the mortises, the ends having been chopped off so that they might slip in easily when raised. It appears that another bridge was subsequently erected at the same place upon the same plans as the one which fell.

There is in fact no complaint that the plans were defective or that the injury was the result of any such defect, and we think the clear weight of the evidence shows that the bridge fell from a want of care in doing the work, and not from any defect in the plan.

We are of the opinion a fair construction of the contract shows that Dorwin & Co. were independent contractors, and were not the servants of defendant in error. While the latter retained the right of supervision over the construction of the bridge, so as to see that the work was done according to the plans and specifications therefor, to that extent only it retained the right of directing how the work should be done. The details of the work, and the particular manner in which it should be accomplished, so long as it conformed to the plans and specifications, were under the exclusive control of Dorwin & Co. or their sub-contractors. Plaintiff in error was the servant of the sub-contractor Fox, and not of the defendant in error.

By the express terms of the contract Dorwin & Co. were not to be relieved from the immediate charge and responsibility of the work. It was through the negligence of the contractors, or their sub-contractor, Fox, that plaintiff in error was injured, and not because of any negligence on the part of defendant in error, or any of its officers or agents. It is strongly urged by counsel for plaintiff in error that Dorwin & Co. were not independent contractors because defendant in error retained the right of supervision and control, and because, they say, "it could direct or discharge an employe at will or for cause." It is true the railroad company retained the right of supervision to the extent we have stated above, but we nowhere find that it retained the absolute right to discharge employes, either at will or for cause. It retained the right to demand the discharge of an employe under certain circumstances, but we do not think that fact made it the principal or master, so as to render it liable for the negligent acts of the contractors, whereby injury might result to their employes.

We think this case falls within the principles laid down by our Supreme Court in the case of *Hale et al. v. Johnson*, 80 Ill. 185, wherein it is held that "one who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor and not a servant." *Shearman & Redfield on Neg.*, Sec. 77; *Wharton on Neg.*, Sec. 181; *Kipperly v. Ramsden*, 83 Ill. 354; *Scammon v. City of Chicago*, 25 Ill. 424; *Wadsworth-Howland Co. v. Foster*, 50 App. 513; *Chicago City Railway Co. v. Hennesy*, 16 App. 153; *Pfau v. Williamson*, 63 Ill. 19.

Under the doctrine laid down in these cases, we think the evidence for plaintiff failed to make out a cause of action against defendant, and the court committed no error in directing a verdict in its favor. When the evidence, with all fair and legitimate inferences therefrom, is so insufficient

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to sustain a verdict for the plaintiff that the court must set it aside if rendered, the court will be justified in directing a verdict for the defendant. Pullman Palace Car Co. v. Laack, 143 Ill. 252; Simmons v. Chicago & Tomah R. R. Co., 110 Ill. 346.

In the case at bar, if the evidence had gone to the jury and a verdict had been rendered for the plaintiff, we think it would have been the duty of the court to set it aside.

In our opinion, the direction of the court below was strictly in accordance with and warranted by the above authorities, and the judgment must be affirmed.

McAleenan & Co. v. John Myrick.

1. **MASTER AND SERVANT—Hazards Assumed by Servant.**—Ordinarily a servant assumes all the usual known dangers incident to his employment, and also the hazards resulting from the use of defective machinery, if its defects are as well known to him as to his employer.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1896. Reversed. Opinion filed December 9, 1896.

STATEMENT OF THE CASE.

This was an action on the case by appellee to recover for damages to the fibula of his leg, two or three inches above the ankle joint.

The case was tried by a jury and resulted in a verdict of \$800 for appellee, and judgment was rendered thereon.

The declaration contained three counts, charging that while the appellee was working for appellant in its boiler shop, and was in the exercise of due care, he slipped and fell into a pit or hole, maintained by appellant in the floor of its boiler shop, which was then and there dangerous, and that the appellee's leg was then and there broken and his ankle sprained, etc.

The second count alleges the same matter as the first, and also that for want of sufficient light the appellee, while working in the line of his duty in the night time, and while in the exercise of due care, fell into the pit and broke and sprained his leg and broke his ankle.

The third count is substantially the same as the second.

The facts as disclosed by the evidence are that, March, 1895, the appellant was, and for several years prior thereto had been, operating a boiler shop at the corner of Washington and Oak streets in the city of Peoria.

The shop had a frontage on Washington street of about seventy feet; a portion of it extended back at right angles to Washington street one hundred feet; another portion extended along Oak street forty-four feet. The floor of the shop was three feet ten inches above the level of the sidewalk on Washington street, and for the purpose of doing away with dangerous and unsafe skids, etc., in loading boilers, which were very heavy, weighing from five to fifteen tons, defendant opened back into the shop from Washington street, in the part that was forty-four feet deep, and near the office, on a level with the street, a way or pit, which was three feet ten inches deep and about ten feet wide and fourteen feet long. It was paved and walled up with brick, except at the end opening onto the street. It had a plank a foot wide, around the top, extending back from the edge and on a level with the floor of the shop.

It was customary to place boilers, which were ready to be tested, with their heads over this pit, so that the water used in testing would not run into the shop.

Boilers were tested by attaching a force pump, by a hose, to the boilers, and pumping by hand from a tub near by. If leaks were found, the men were there and calked where necessary.

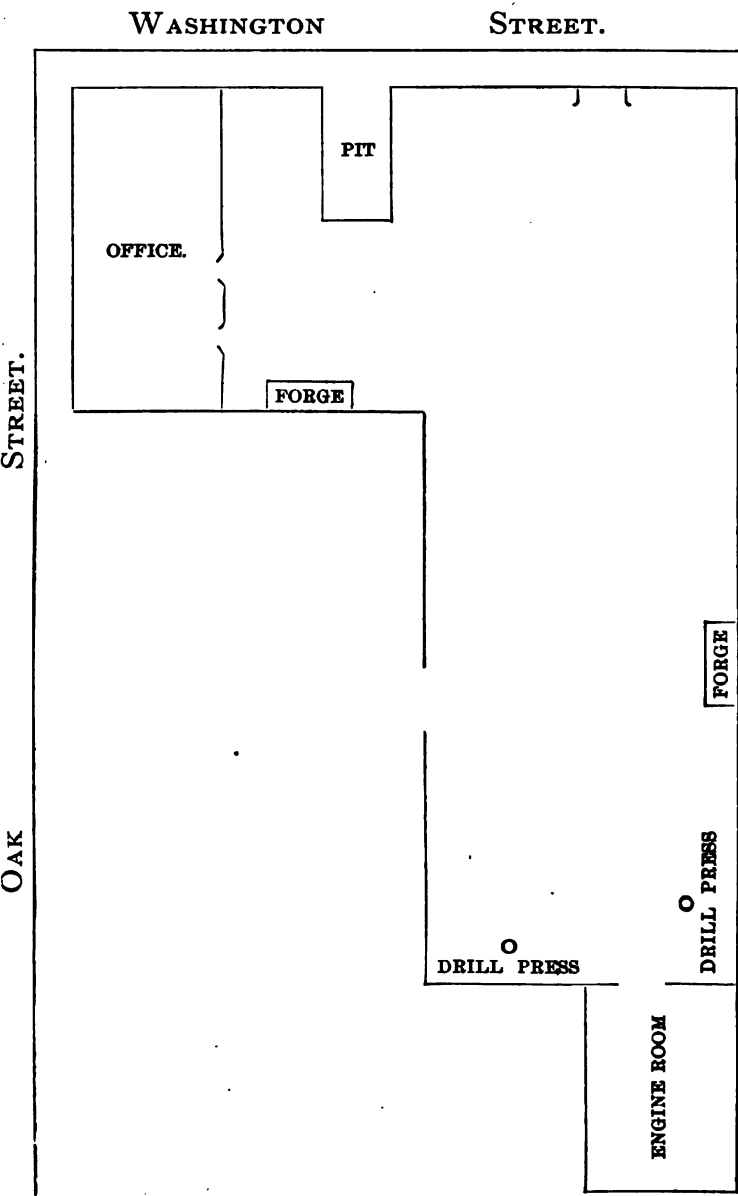
The men frequently worked in the shops at night, and were paid extra for such work. The plaintiff had charge of the engine and boiler of the shop, operated drill presses, worked the force pumps while testing, and it was his duty to do any work which he was requested to do by the foreman.

He went to work in the shop in 1892, and remained sixteen months. He again commenced in June, 1894, and worked until the time of the accident on March 21, 1895.

Back of the office was a ware or store room, which was connected with the shop by a door four feet from the back of the forty-four foot part of the shop, where the pit was. Plaintiff, in the course of his duties, went from the engine room, in a remote part of the shop, past the pit (into which he afterward fell) into the ware room and office several times each day, from June, 1894, till March 21, 1895, and it was a part of his duties to close and fasten, every night, the doors, which were the width of the pit and extended from the ceiling of the shop to the bottom of the pit, on Washington street. These doors were opened to admit wagons to the pit and for the better lighting of the shops. On the 21st day of March, the plaintiff was asked by McConnell, the foreman, to return and work that night. Plaintiff returned about half past seven and found then for the first time, as he claims, that the electric lights were not in use.

He was sent to a grocery store, which was more than a block away, for some candles, and got a quarter's worth, though he says he does not know how many there were; on his return he gave them to the foreman, lighted one for himself, and the other four men each took one and lighted it. Then he pumped water into the boiler for the test, and when that was done, he held the foreman's candle, while he calked a rivet. After that a workman asked him to hold the candle around on the other side; he reached around and fell into the pit, breaking one bone of the left leg above the ankle joint. Dr. DuMars attended him the usual length of time for such an injury, seven or eight weeks.

The following is the diagram of the building and premises:



McAleenan & Co. v. Myrick.

PAGE, WEAD & PUTERBAUGH, attorneys for appellant.

ISAAC C. EDWARDS, attorney for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

The above are substantially all the facts in the case as shown by the evidence necessary to be noticed.

The appellant asked the court to instruct the jury to find the defendant not guilty.

The case is presented to this court to decide from the facts whether the appellee had a cause of action, and we have considered it solely in that view.

As a general rule of law, the servant will be regarded as "voluntarily incurring the risks resulting from the use of defective machinery, if its defects are as well known to him as the master. But this rule will not be applied where the master, by urging on the servant, or coercing him into danger, or in some other way, directly contributes to the injury." *Drop Forge and Foundry Co. v. Van Darn*, 149 Ill. 341; *East St. Louis Ice and C. Co. v. Crow*, 155 Ill. 75.

The evidence shows that appellee was as well informed in regard to the dangers of the pit in question as his employer. He knew all about it; knew that it was uncovered and without railing; that any one working about it was liable to fall into it, unless he exercised care, and he knew also if it was dark the danger would be greater, and the care required correspondingly greater. Working after night was part of his duties, and he knew that there was no electric light, and that they were working by candle light. He made no objection to the working in that way, nor was he in the least coerced or deceived. He was asked to hold the light around by a fellow-workman, and in doing so he failed to exercise proper care, and fell into the pit.

The declaration avers that he was working in the line of his duty. He worked there in the shop every week, and did whatever he was told to do. He had done this kind of work before repeatedly. He procured the candles himself, and went to work about the pit without any objection

or complaint. He was neither hurried, nor coerced, nor deceived, nor surprised.

The appellee was twenty-seven years of age, and had had years of experience in the business, and should be held to have assumed the risk of his employment with the pit uncovered as it was. *Herdman-Harrison Milling Co. v. Spehr*, 145 Ill. 329.

Many other cases might be cited, but the rule is well established, as will be seen by reference to the above cases.

Upon the evidence we are constrained to hold that the court below erred in refusing the instruction requiring the jury to find for the defendant.

For this error the judgment of the court below is reversed, but as the appellee has no cause of action it will not be remanded.

FINDING OF FACTS.

We find that the appellant was not guilty of any of the acts of negligence charged in the declaration, and not guilty as charged in either count thereof; and further, that the facts are as stated by the court in the opinion.

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Joliet Gas Light Company v. J. E. Sutherland.

1. *REAL ESTATE—Non-performance of Conditions Subsequent—Waiver of Forfeiture.*—A non-compliance with a condition subsequent does not of itself determine an estate, as the right to enforce a forfeiture may be waived. Notwithstanding the breach, the estate abides in the grantee until it is defeated or determined by the election of the grantor.

2. *FRANCHISES—Acts Done in Pursuance of, Inure to Benefit of the Owner.*—A held a franchise giving him the right to lay gas pipes in the street and alleys of a city, and contracted with B to form a gas company, A to furnish the franchise and B to furnish the money to construct a plant and lay pipes. Under this contract B laid pipes in two streets and then abandoned the work. *Held*, that the pipes when laid became attached to the easement belonging to A, and that B, by his abandonment of the contract, lost all his rights in the pipes.

3. *APPEALS—When a Remedy at Law is Not Available on Appeal.*—

Joliet Gas Light Co. v. Sutherland.

The existence of a remedy at law can not be set up on appeal to defeat an injunction, when not presented by way of demurrer or answer to the bill in the trial court.

Bill for Injunction.—Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

C. W. BROWN and FRED BENNITT, attorneys for appellant.

HALEY & O'DONNELL, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

On the 13th of April, 1889, the city of Joliet, by ordinance, granted to Michael Moran the right to erect gas and electric light plants, and lay pipes in the streets and alleys of the city, under certain conditions. According to the terms of the ordinance, and an extension subsequently made, the works were to be completed, ready to supply gas, by November 1, 1891.

In the summer and fall of 1889 a corporation to erect and operate a gas plant under the ordinance was organized by Moran, W. H. White of New York, W. W. Goodwin of Philadelphia, H. M. Kinsley and F. G. Beach of Chicago. It was arranged for Moran to have \$5,000 paid up capital stock, and to be superintendent at a salary of \$125 per month. Under that arrangement he executed and left with J. W. Downey, an attorney, in escrow, a deed of all his right under the ordinance to the corporation, but the deed was never delivered.

Pending the organization of the company, a gas main and other pipes were laid for some distance upon two of the streets, at an expense of \$6,528, including the salary paid to Moran as superintendent. That sum was paid by White. Nothing further was done under that organization toward laying pipes or erecting the plant. Moran continued as superintendent and drew his salary until the fall of 1890, when it was discontinued. It had been agreed that White, with the assistance of Goodwin, should furnish the money with

which to complete the works. That failing, Moran repossessed himself of the deed which he had left in escrow, and in 1892 secured the passage of another ordinance granting him the right to construct a gas plant, etc., to be completed November 1, 1894. In October, 1894, he secured an extension of the time to complete the plant until November 22, 1895.

On the first of August, 1895, Moran conveyed and assigned to appellee, John E. Sutherland, all his right and interest granted by the various ordinances mentioned, and all right and interest in the pipes laid, incomplete structure, and contracts which had been made with parties for the supply of gas. Sutherland took possession and began making changes with a view to connecting with house pipes. During the same month Ira C. Copley, being a large owner of stock in the Joliet Gas Light Company, a corporation engaged in the gas business in Joliet, visited White in New York, and procured from him an assignment and transfer of the gas mains and pipes laid in the streets under the supervision of Moran in 1890, for \$1,000, of which \$100 was paid down and balance to be paid in two years provided Copley could establish himself the rightful owner of the pipes under the assignment. On the 31st of August, 1895, Copley executed a bill of sale of the mains and pipes to the Joliet Gas Light Company, which company began at once to make preparations to connect certain of its mains with such pipes, and use the same. Thereupon, Sutherland filed a bill in the Circuit Court enjoining the Joliet Gas Light Company, appellant, from connecting with or using said pipes. A temporary injunction was granted by the master. Two days afterward appellant filed a bill to restrain appellee Moran and one T. J. Highland from using or connecting with said pipes. A temporary injunction was obtained on its bill. Answers were filed and the two cases were tried together. In the first case, a decree was granted in favor of Sutherland, making the injunction perpetual. In the other case, the injunction was dissolved and the bill dismissed for want of equity. Appeals are prosecuted in both cases.

Joliet Gas Light Co. v. Sutherland.

It was contended in the Circuit Court that inasmuch as the gas works were not completed within the time limited by the ordinance of 1889, and the subsequent extension, the franchise to Moran became void; that Moran did not lay the gas pipes on his own account, but as an employe of other persons or corporations; that he could not transfer any right in the franchise or in the pipes to Sutherland, because he had none, and that the ownership in the pipes was in appellant by virtue of the assignment and conveyance from White to Copley and from Copley to it.

All of those contentions are made here with the additional one that appellee's remedy was complete at law, and that a court of chancery has not jurisdiction of the case as presented by his bill and proofs.

To the first contention, it is sufficient to say that the only party having a right to insist upon a forfeiture by reason of a non-fulfillment of the condition subsequent, that the plant should be complete by November 1, 1891, was the city of Joliet. The provision requiring the completion of the works by that date or the ordinance should be void, was inserted for the benefit of the city. It nowhere appears that the city has ever sought to avail itself of that provision; but, upon the contrary, has manifested its desire to keep Moran's franchise alive by re-enacting the ordinance in 1892, and by extending the time limit in 1894. No third party could invoke to his benefit that provision of the contract so long as the parties to the contract are willing to waive it. *Ludlow v. N. Y. & H. R. Ry. Co.*, 12 Barb. 440. Forfeitures for breach of conditions subsequent are not favored by the courts of this State. *Clark v. Lyons*, 25 Ill. 105; *Voris v. Renshaw*, 49 Ill. 425; *Palmer v. Ford*, 70 Ill. 369; *Mott v. Danville Seminary*, 129 Ill. 403.

To the contention that Moran did not own the pipes (having laid them as an employe), but that they were owned by White, because Moran made a deed of the franchise, left it with the attorneys of the parties, and thereby induced White to incur all the expense of material and labor necessary to the work, it may be replied that the deed was merely delivered in escrow, to become operative only upon condition of

Moran receiving \$5,000 in paid up stock and the permanent position of superintendent. The purport of the agreement was that White should construct the plant and lay the pipes under Moran's franchise, and turn the completed works over to the corporation, and that Moran should then turn over to the corporation the franchise, and receive in payment the \$5,000 in stock and the position of superintendent. But White failed to construct the work. The enterprise was abandoned. That he invested nearly \$7,000 in it and then abandoned it is no fault of Moran's. White and his coadjutor, Goodwin, violated their contract, and not Moran. When the enterprise was abandoned and Moran repossessed himself of his deed, he owned the franchise and all privileges going with it.

The interest which Moran had in the streets by virtue of his franchise was an easement. When the line on which to locate the mains in the street was fixed and the pipes were laid, the easement became fixed and perpetual, subject only to the limit provided in the contract for the completion of the works. White's abandonment of the work left Moran in a position to dispose of his right in the easement and the pipes in any mode he might see fit, consistent with the rights of the city under the contract. Clearly, the right of the litigation is with Moran's purchaser, the appellee.

To the contention that appellee has knocked at the wrong door of the court, and should have sought entrance at the forum where rights at law are declared, it may be observed that appellant has been a long time in finding that out. Appellant did not demur to the bill, nor did it, by any averment in its answer, question the jurisdiction of the court; but by denying ownership of the pipes in appellee, and claiming to be the owner itself, it tendered by its answer, as an issue of fact, the question of ownership. Having done so, and having that question determined against it, it is now too late to raise the jurisdictional contention for the first time in this court. *Mason v. Bragdon*, 159 Ill. 61; *Village of Vermont v. Miller*, 161 Ill. 210.

The evidence supports the decree.

The Joliet Gas Light Co. v. J. E. Sutherland.

1. **MEMORANDUM.**—See case of same title, p. 230 *ante*, for a recital of the facts of this case, and for the grounds of the decision herein.

Bill for Injunction.—Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

C. W. BROWN and FRED BENNITT, attorneys for appellant.

HALEY & O'DONNELL, attorneys for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court, dismissing for want of equity a bill filed by appellant to restrain appellee from using or interfering with certain gas mains and pipes claimed by appellant.

Appellant set up ownership in the mains and pipes, which the court on a hearing found it did not have. The facts involved have been recited in the opinion, *Joliet Gas Light Company v. Sutherland*, *ante*, 230.

The decree is affirmed for the same reasons that appear in that opinion.

Edward Granger v. Domethilde Bissonnette et al.

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1. **PROMISSORY NOTES—Cancellation of—Substitution of New Notes for Old Ones Secured by Mortgage.**—Where, by mutual agreement of the parties, new notes are given and accepted in lieu of and for the purpose of correcting a mistake in notes previously given and secured by mortgage, the maker is entitled to have the old notes canceled, but the mortgage securing them will stand as security for the new notes.

Bill, for the cancellation of promissory notes. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded with directions. Opinion filed December 9, 1896.

WILLIAM POTTER and GRANGER & DAVIDSON, attorneys for appellant.

H. K. WHEELER, attorney for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a bill in equity, by appellant against appellees, for the purpose of having an old note canceled, and a new one held to be in force in place of it, and a mortgage given by appellant to secure the old note held to be in force to secure the new note.

Charles Granger was the father of appellant, as also father of appellees in this case. The bill alleges that the consideration of the lands in question was \$4,400; that a deed was duly made about October 16, 1882, for the said lands, and that part of the consideration for the sale was in the shape of notes signed by appellant, and at the request of said Charles Granger, made payable to the appellees respectively; that the notes remained in the possession of Charles Granger, and in 1891, at the request of said Charles Granger, while the latter had the notes in possession, they were exchanged for notes of the same date, payable to the same parties, but in larger amounts, the said Charles Granger claiming that a mistake had been made in the price of the land at the time the deed and notes were made in 1882; that upon the making of the new notes in larger amounts, the old notes were given up by Charles Granger to the appellant, but that a mortgage that had been given to secure the original notes was not released, the fact that its having been given not being remembered by appellant; that after the death of Charles Granger and after the new notes had come into possession of appellees, appellant discovered that such a mortgage had been given, and that thereupon he went to each of the said appellees and requested a release of said mortgage, offering at the same time to either give a new mortgage securing the new notes or pay the notes themselves, all of which the appellees refused to do. Further, the bill alleges that the said mortgage is a cloud upon the

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title of appellant, rendering the title to his lands unmarketable and depreciating the value thereof. The bill then "prays that the court may order the appellees to release said mortgage and in default of such release a special commissioner be appointed to make said release, or if the court shall deem it more equitable that the appellant give a new mortgage to secure the new notes, then that an order be made to that effect upon tendering to the appellees a mortgage upon the lands in question, and that the old notes be declared canceled and of no value, and that an order be made for the release of the old mortgage as prayed for, and for such other and further relief as to the court may seem fit." Which prayer, by leave of the court, was amended by adding the following: Or that the mortgage given to secure the old notes be declared to be a mortgage to secure the new notes. And that upon the payment of said new notes the payee of such new notes respectively, when so paid, shall release said mortgage so far as such payee is concerned."

The defendants answered the bill, claiming that Charles Granger executed the notes as claimed for the respondents, and that the title of the notes became vested in the respondents, and deny that Charles Granger had the power to divest such title without the consent of the respondents. They admit that while Charles Granger held possession of the notes he did so for them; deny that Charles Granger delivered up the notes and had them canceled, or that they ever authorized it; deny that the new notes were given in consideration of the surrender of the old ones. They also aver that the new notes were given to appellees by Charles Granger to make them equal with their brothers in the distribution of the estate and to balance up rents the appellant received while the notes were held by Charles Granger, and that the old notes and new ones were only sufficient to make the respondents equal in the division of their father's estate and that that was what they were given for.

On the trial of the said cause the court below dismissed the bill for want of equity and decreed the costs against the appellant. From that decree this appeal is taken. The

first notes were \$942.85 each to the respondents, and the new notes were \$1,000 each.

We have examined the evidence carefully and have arrived at the conclusion that the new notes were given and intended to be by Charles Granger, in lieu of the old notes; that his only object was to increase the gift to his daughters to \$1,000 each, and that that was agreed and so understood between him and the appellant. This fact sufficiently appears, as we think, by the evidence of Elizabeth Granger (formerly Beaubien), Narcisse Granger, Edward Granger, Sarah Granger and Hermine Granger.

We think the testimony of these witnesses was corroborated to some extent by the testimony of the appellees.

This being the case it would be inequitable and unjust to the appellant to allow the appellees to receive and retain both the old and the new notes.

If they accept the new notes, equity would require that they cancel the old ones; either that or that they surrender up the new notes and claim the old ones.

We think, under the evidence, that the court below should have granted the relief sought by appellant's bill; that it should have decreed the cancellation of the old notes, and that the mortgage stand as security for the payment of the new ones, the latter having been given to correct error in the old ones. We think that the deceased had a right in his lifetime to make the change in the notes, but even if he had not, and what he did was intended to substitute the new notes for the old ones by agreement with appellant, the appellees would not be allowed to claim the payment of both series of notes.

The decree of the court below is reversed and the cause remanded, with directions to that court to grant the relief prayed for in the bill as indicated in this opinion, with the costs of this court and those of the court below against appellees. Reversed and remanded.

Narcisse Granger v. Domethilde Bissonnette et al.

1. **MEMORANDUM.**—See the case of Granger v. Bissonnette, p. 235, *ante*, for a recital of the facts of this case and for the grounds of the decision herein.

BILL, for the cancellation of promissory notes. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded with directions. Opinion filed December 9, 1896.

WILLIAM POTTER and GRANGER & DAVIDSON, attorneys for appellant.

H. K. WHEELER, attorney for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This is the same kind of a bill as the one in the case No. 3017, of Edward Granger against the same appellees, and depends upon the same evidence taken in that case. The decree of the court below is the same.

The opinion of this court in this case will be the same as in that case and the decision of this court the same.

The decree in this case will therefore be reversed and the cause remanded with directions to the court below to grant the relief prayed for in the bill; that is, that the old notes be canceled which are set out and described in the bill, and that the mortgage be held as security for the new notes executed to appellees and described in the bill, and that the costs of this court and those of the court below be adjudged against appellees. Reversed and remanded.

Aaron S. Oakford et al. v. Crammer W. Brown.

1. **ATTORNEY'S FEES**—*Allowance of, Under Trust Deed, Before Sale.*—A trust deed provided that under certain circumstances it might be foreclosed, and authorized the court "out of the proceeds of

any such sale to first pay the costs of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and reasonable attorney's and solicitor's fees." *Held*, that a fair and reasonable construction of this provision authorized the allowance of solicitor's fees in a foreclosure suit, brought under such deed, for services rendered up to the time of their allowance, although no sale of the property involved had been ordered or made.

Bill, for foreclosure. Appeal from the Circuit Court of Stark County; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

ARTHUR KEITHLEY, attorney for appellants.

B. F. THOMPSON, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Appellee filed his bill to foreclose a trust deed, executed by Zura Fuller and Frances M. Fuller, his wife, praying for an allowance of a solicitor's fee as provided for therein.

Appellants were made parties because of some interest in the land covered by the trust deed. They answered admitting all the allegations in the bill, except that the complainant was entitled to solicitor's fee. The answer further alleged a legal tender of the amount due and that the same was on deposit with the clerk.

The proofs show a tender of all due excepting solicitor's fee. The court held that appellee was entitled to a solicitor's fee of \$75, and decreed that unless that sum, in addition to the amount tendered, was paid in ten days, the master should sell the property.

Upon the ground that the court erred in allowing a solicitor's fee, appellants seek a reversal of the decree.

The trust deed provides that in the event of certain contingencies the trust deed may be foreclosed, "and out of the proceeds of any such sale to first pay the costs of such suit, all costs of advertising, sale and conveyance, including the

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reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and reasonable attorney's and solicitor's fees."

It is contended that as the contract provided for the payment of reasonable solicitor's fees out of the proceeds of sale, that without the case proceeding as far as sale, no fee could be collected. In other words, that in a suit for the foreclosure of a trust deed with such a provision for solicitor's fees the charge of a solicitor's fee for complainant could be defeated by the defendant bringing into court the amount of principal and interest and costs to date. There are authorities in other States to support that contention, but we can not approve them.

The evident object in providing for solicitor's fees in the trust deed was, that in the event the mortgagor should fail to pay the debt, and the holder of the indebtedness should be compelled to resort to a foreclosure to collect these, solicitor's fees should be allowed to reimburse him.

We can not adopt a construction so narrow that the payment of solicitor's fee could be escaped by paying principal, interest, court costs and advertising costs at any time before the land was offered for sale.

A fair and reasonable construction authorized the allowance of solicitor's fees for services that were rendered up to the time of their allowance. Decree affirmed.

Peter A. Strubhar v. William Misch and Louis Misch.

1. *CONTRACTS—Will be Enforced as Made.*—A contract for the sale of a stock of goods provided that the value of the stock should be ascertained by invoicing it at cost prices, these to be obtained from the bills of purchase where such bills were in the possession of the vendor, and where they were not, the cost prices marked on the goods to be taken as the cost or price at which they should be invoiced. *Held*, that the vendor was not bound to try to procure duplicate bills where the originals could not be found and that the contract must be enforced as executed in the absence of proof of fraud in marking the goods.

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Assumpsit, on a contract of sale. Appeal from the Circuit Court of Iroquois County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 2, 1896.

ISAAC M. HAMILTON, attorney for appellant; PAYSON & KESSLER, of counsel.

FREE P. MORRIS and FRANK L. HOOPER, attorneys for appellees.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit by appellees against appellant, to recover damages for the breach of a written contract, whereby appellant had agreed to convey to appellees 160 acres of land in exchange for a stock of goods.

There was a trial by jury and appellees had a verdict and judgment for \$1,000.

Appellant was the owner of a farm of 160 acres subject to an incumbrance of \$4,000, and appellees, as partners, owned a stock of goods and merchandise. The parties agreed to make an exchange, the farm to be valued at \$65 per acre, and the value of the stock of goods to be ascertained by invoicing them at cost prices, these to be obtained from the bills of purchase where appellees had such bills, and where they did not, the cost prices marked on the goods were to be taken as the cost or price at which they should be invoiced to appellants. If upon taking the invoice it was found that the stock of goods was worth more than the farm at \$65 per acre, appellant was to pay the difference in cash. On the other hand if the stock of goods should prove to be worth less than the farm, appellees should pay the difference. The contract was in writing and contained the following provision: "It is further understood and agreed by and between the parties hereto, that in case either party shall fail or refuse to comply with the agreements hereinbefore stated, that said party so failing agrees to pay the other party \$1,000 as a damage resulting from said failure." The invoice was to be taken at any

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time between February 15, 1894, and March 1st of the same year, and the exchange was then to be made.

When the time came to carry out the contract, appellant went to the store of appellees with two men to help him in invoicing the stock, and he swears he was then ready and willing to carry out the contract, and that he then had a deed for the farm executed and ready for delivery. The evidence shows that appellant and his two friends looked over the stock, and the parties then commenced taking the invoice, but the work had not proceeded far, when appellant's assistants began to claim that the goods were marked too high and appellant demanded a reduction of the prices. This being refused, appellant and his friends ceased taking the invoice and went away, appellant refusing to carry out the trade. His claim was and is, that the goods were fraudulently marked too high, that appellees refused to furnish bills of purchase to verify the cost prices, and also refused to procure duplicate bills of purchase. On the other hand, both of the appellees and one or two of their clerks testify that the goods were marked at fair cost prices, and that the cost marks had not been in any manner changed since the trade was first talked of, and that all the bills of purchase which they had were produced and offered to appellant. There is some conflict in the evidence as to the bills which were produced, but if the jury believed the statements of appellees and their witnesses they did all that the contract required them to do and were not in default. They were not bound to try and procure duplicate bills for goods purchased years before, because the contract did not provide for it. On the contrary, the contract distinctly specified what should be done in the event that there were no bills, or in the absence of bills of purchase, viz., that the cost prices marked on the goods should be taken as the value thereof. There was no proof whatever of any fraudulent marking of goods by appellees. Even if the few shoes complained of were marked too high, the only difference shown by the evidence would be a very few dollars—a very few cents on a dozen or so pairs of shoes.

We think the appellant failed to show a good and substantial excuse for refusing to carry out the contract, and the jury were warranted in finding the objections raised as frivolous, and apparently gotten up for the purpose of enabling appellant to back out of the trade.

Under the circumstances the appellees were entitled to recover the liquidated damages of \$1,000 provided for in the contract. Complaint is made as to the action of the court in giving and refusing instructions, but we find no error in that respect, and judgment being right under the evidence, it must be affirmed.

Andrew Klees v. The Chicago & E. I. R. R. Co.

1. **FELLOW-SERVANTS**—*Switching and Road Crews of a Railroad Company.*—The crews of switch and road engines whose employment requires them to do switching in the same yards, and to use the same tracks and switches, and makes them necessarily dependent on each other for their mutual safety, are fellow-servants.

2. **SAME**—*Length of Employment and Acquaintance Immaterial.*—The fact that an employe was only temporarily engaged at a particular task and that he had no acquaintance with his co-laborers does not operate to bar the application of the doctrine of fellow-servants.

3. **SAME**—*Ordinarily, a Question for the Jury—Exceptions.*—Whether two persons who are working for the same master are fellow-servants or not, is, ordinarily, a question for the jury; but in a case where there is no dispute as to the facts which show the relationship, and they prove beyond question that such persons were fellow-servants, the court may properly take the case from the jury.

Trespass on the Case, for personal injuries. Error to the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

P. C. HALEY and ALSCHULER & MURPHY, attorneys for plaintiff in error.

W. J. CALHOUN, attorney for defendant in error; W. H. LYFORD and H. M. SNAPP, of counsel.

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Klees v. C. & E. I. R. R. Co.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought by Andrew Klees against the Chicago & E. Ill. Ry. Co., to recover for injuries sustained by him while engaged as engineer on a switch engine in the yards of the company at Chicago. The defense interposed was that the injury was caused by the negligence of other servants of the company engaged at the time in operating a road engine in the yards, and that they were fellow-servants with Klees. A trial was had in the Circuit Court by jury and a verdict of not guilty rendered under the peremptory direction of the court.

In seeking a reversal, Klees contends that he and the servants operating the road engine were not fellow-servants, and that whether they were was a question of fact for the jury and that the court erred in taking from the jury the decision of that question.

The evidence in the record shows that on the day when Klees was injured he, as engineer, formed part of a crew engaged with a switch engine in making up a freight train, which was to be taken south by a road engine. At the place on the road where he was injured there were two main tracks, one for south bound trains and one to the east of it for north bound trains, running parallel with these two tracks, and to the west of them were two lead tracks. These track swere connected by switches, and also by switches connected with some twenty-three side tracks in the yards immediately north of the place of the injury. Klees had just come from one of the side tracks with his engine running backward, pulling several cars into the west lead track. A road engine which was to take a train south had a few minutes before come down on the south main track and backed up the caboose and several cars attached, which were thrown on a side track, and was proceeding to pick up other cars to make up the train. Through the negligence of the brakeman or engineer of the road engine, the road engine was turned upon a cross-over track to the west lead track, and while running north on the cross-over, collided with the switch engine

which was going south on the lead track, thereby tearing away the cab of the switch engine and so injuring Klees as to render the amputation of his leg necessary.

We think the plaintiff was a fellow-servant with the engineer and brakeman of the road train. In this view it is immaterial whether the proximate cause of the injury was the negligence of Lucas, the engineer, or Chapman, the brakeman of the road crew.

It is suggested that the doctrine of fellow-servant should not apply in this case, because the regular duty of Klees was that of an engineer of a transfer engine, that is, of transferring cars from the company's railroad to other roads, in which service he was not thrown into the association of the members of the road crews; that his employment as engineer of a switching crew was but temporary and that he had no acquaintance with Lucas. We do not consider as material the length of time Klees had been operating the switch engine, or the extent of his acquaintance with Chapman and Lucas. He was, at the time of the injury, voluntarily in the employment of the defendant company as engineer of a switch engine and, as such, had assumed all the risks incident to such position. Those of the defendant's employes who were fellow-servants of the regular engineer of that engine were, for the time, at least, fellow-servants with the plaintiff. The question is not whether the personal acquaintance and relations of plaintiff with members of the road crews had been such as to suggest that they would in some way contribute toward guarding against the dangers incident to this line of employment, but whether they were filling positions as co-servants of a common master, in such relation to each other as to suggest that they could mutually contribute toward guarding against such dangers.

Now, what were the relations of the members of the road crew and the members of a switching crew, operating as these crews were in the yards of defendant? Klees and the engineer of the road train were both engineers of crews whose employment required them to do switchwork in the

same yards. True, their duties were not identical, for the road crew devoted the greater part of their time to transporting cars from station to station along the line of the road, while the time of the switching crew was given almost entirely to the yards. But before starting out on a run, and during the making up of a train, they performed the same kind of service, that is, switching and transferring cars from one track to another. While in the yards both crews were under the direction of the same superior officer—the yard master. In the performance of their duties the engineers were required to drive their engines forward and backward through the same switches, over the same tracks, leads, and cross-overs, pushing and pulling cars from track to track in different parts of the yard. Brakemen from the road crew and switchmen from the other crew turned the same switches and in the same manner controlled the movements of their respective engines. In such work they were exposed to the hazard of collisions. The conditions were such as to create an incentive to the exercise of care and caution. There was a necessary dependence on each other's care and vigilance for their mutual safety. The collision in this case was due to the turning of the wrong switch by Chapman, or the negligent act of Lucas in driving his engine upon a track that brought it in collision with the other engine.

Our view is supported by the following authorities: Bailey's Master's Liability for Injuries to Servants, 171, 316; C. & N. W. R. R. Co. v. Moranda, 93 Ill. 302; Abend v. T. H. & I. R. R. Co., 111 Ill. 202; Rolling Mill Co. v. Johnson, 114 Ill. 57; T. H. & I. R. R. Co. v. Leiper, 60 App. 194; affirmed by Supreme Court, June, 1896; E. J. & E. R. R. Co. v. Malaney, 59 Ill. App. 114.

In the opinion in the last mentioned case we have expressed the views of this court upon this much mooted question.

The plaintiff in error contends that the court invaded the province of the jury by directing a verdict for the defendant; that the sole question in dispute being whether the injury

was caused by the negligent act of a fellow-servant, it should have been left to the jury to say what were the relations between the plaintiff and the employe who caused the injury. The question is, ordinarily, one of fact for the jury, but in a case where there is no dispute whatever as to the facts which show the relation of the two, and the relations are such as to show beyond question that they were fellow-servants, the court may properly take the case from the jury, if it appears that the injury was due entirely to the negligence of a fellow-servant.

Judgment affirmed.

Peoria General Electric Co. v. John Gallagher.

1. MASTER AND SERVANT—*A Servant Assumes the Usual Hazards of his Employment.* — In a personal injury suit brought by a servant against his master, it appeared that the servant was not exposed to any risk or danger which he could not, in the exercise of his natural faculties, have fully comprehended and appreciated, and that the injury was caused by an accident falling within the usual hazards of the employment. *Held*, that the master was not liable.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1896. Reversed. Opinion filed December 9, 1896.

PAGE, WEAD & PUTERBAUGH, attorneys for appellant; STEVENS, HORTON & ABBOTT, of counsel.

DAN R. SHEEN and ARTHUR KEITHLEY, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was an action on the case by appellee to recover for injuries sustained by him while in appellant's service in repairing, or making changes in, appellant's wire line.

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There was a verdict for \$6,000 in favor of appellee, a remittitur for \$3,000, and judgment for \$3,000.

The principal causes for reversal urged are, that the verdict is against the evidence, and that the evidence does not support the declaration even if it be considered that the declaration does show negligence of defendant.

The negligence charged was that the fastenings holding glass insulators on the cross-beams of a thirty-foot pole, about to be removed, were so badly decayed that a jar of the pole would cause the insulators to fall, and that while the plaintiff was cutting a guy wire under the peremptory order of appellant's foreman, one of the insulators fell from its fastenings and knocked him to the ground.

The plaintiff testified that the foreman, under whom he was working, assured him that the pole was safe, and peremptorily ordered him to go up the pole and cut the guy wire; that he did so; that on cutting the guy wire the pole sprung back some three or four feet and shook off an insulator which struck him.

He is contradicted by the foreman as to the assurance that the pole was safe, and as to the peremptory order to ascend it. A clear preponderance of the evidence is against him, as to his being struck by an insulator. We think it clearly shows that he fell for some other reason, most probably because of his spur slipping over a tin sign which had been nailed to the pole.

The particular line of employment in which appellee was engaged—that of removing the wires from smaller poles and placing them upon larger ones, and of removing the smaller poles—was necessarily dangerous. In his contract of employment, appellee undoubtedly assumed the hazards growing out of the defective or insecure condition of the poles that he was compelled to climb and assist in removing. He was no novice in his business because he had been engaged in that line of employment in Peoria and elsewhere for a number of years. We think the accident which befell appellee falls clearly within the usual hazards of the business.

We are also of the opinion that the proofs fail to show

that appellant was chargeable with any negligence which contributed to the accident. It was not required to give appellee warning, because it was not in possession of the knowledge of any defect contributing to the injury, not possessed by appellee himself. It did not expose appellee to any risk or danger which he could not, in the exercise of his natural faculties, fully comprehend and appreciate. The danger encountered by appellee he was presumed to know. The case is clearly distinguishable from that of *Anderson Pressed Brick Co. v. Sobkowiak*, reported in 148 Ill. 573.

Entertaining the opinion that appellant was guilty of no negligence which contributed to appellee's injury and that his injury was caused by an accident falling within the usual hazards of his employment, we reverse the judgment but do not remand the cause. Judgment reversed.

FINDING OF FACTS TO BE INCORPORATED IN THE JUDGMENT.

We find that the injury for which the plaintiff below brought this suit to recover, occurred by reason of an accident falling within the usual hazards of his line of employment; that the defendant was guilty of no negligence which contributed to the plaintiff's injury and that the plaintiff has no cause of action against the defendant.

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Charles Kauffman v. David Wiener et al.

1. CHANCERY JURISDICTION—*Insolvency of Trespassers*.—The insolvency of a trespasser and the fact that the proceeds of property wrongfully taken by him, is still in the hands of a purchaser, will not justify a resort to a court of equity to recover damages for such trespass and to secure an order directing such purchaser to pay the money in his hands to the complainant.

Bill, for an accounting. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded with directions. Opinion filed December 9, 1896.

Kauffman v. Wiener.

HALEY & O'DONNELL and COWING & YOUNG, attorneys for appellant.

GEORGE S. HOUSE, attorney for appellees.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was a bill in equity based upon the following alleged state of facts: Appellees, David and Selma Wiener, are husband and wife. For many years prior to February, 1895, David Wiener had been engaged in business at Joliet, Illinois, among other things, dealing in wood, wood props, etc. His manner of carrying on the latter business was to buy the standing timber and cut it up into cord wood and props, for sale to such persons as might desire to purchase. In the month above mentioned he became financially embarrassed, and transferred to one Lawrence Kennedy, his clerk, all the standing timber on a certain tract of land known as the east half of section nineteen in the town of Reid, near Braidwood, in said Will county. There was, at the time of such sale, a considerable quantity of wood and props already cut and remaining on the ground on the lands above described, of which David Wiener retained the ownership.

On February 7, 1895, one Goldsmith recovered a judgment against David Wiener for the sum of \$1,000, upon which judgment an execution was issued and placed in the hands of the sheriff of said county, who levied the same on the wood and props remaining on the ground, such wood and props being turned out by David Wiener to the sheriff for the purpose of being so levied upon. There was also a levy upon other property, and upon a sale by the sheriff under the execution, appellant bid for the wood and props levied upon, the sum of \$750, and the same were struck off and sold to him at that price, which he accordingly paid. Subsequently to the sale, Kennedy transferred to Selma Wiener all his interest in the standing timber on the tract of land above described, and also all his interest in the wood and props remaining within the lines of the standing timber,

and she, through her agent and husband, David Wiener, went on with the cutting of the timber into wood and props, a large amount of the wood being shipped and delivered under contract to the Joliet Steel Company, at \$3.38 per cord delivered, and a large number of cords of props shipped and delivered to the C. W. & V. Coal Company at \$4 per cord. Appellant alleges and insists that appellee Selma Wiener, through her agents and servants, hauled off the greater part of the wood and props purchased by him at the sheriff's sale. That she sold the wood to the Joliet Steel Company, and the props to the C. W. & V. Coal Company, leaving of the wood purchased by appellant only twenty-two and one-half cords, and of the props only four and one-half cords.

The bill was filed by appellant against Selma Wiener for the purpose of charging her with, and compelling her to account for, the wood and props which appellant claims she had caused to be hauled away and sold, as well as to tie up the money due her for the same from the Steel company and the Coal company, who, together with Lawrence Kennedy and David Wiener, were made co-defendants to the bill. It was alleged in the bill that appellees, David and Selma Wiener, are insolvent, and their property much involved in litigation, and an injunction was prayed to restrain the Steel and Coal companies from paying the amounts due to Selma Wiener for the wood and props delivered to them by her, and restraining Selma Wiener from removing any more of the wood and props which appellant claimed to have purchased at the sheriff's sale. A temporary injunction was granted as prayed, various modifications of which were afterward made, either by order of the court or upon the agreement of the parties. Answers were filed by the several parties, and a reference made to the master to take and report proofs and his findings thereon.

There was a sharp controversy between the parties and a conflict in the evidence, as to the quantity of wood and props levied upon by the sheriff and sold to the appellant, the latter claiming there were 550 cords, of which two-thirds

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were props, while appellees, David and Selma Wiener, insist that appellant only purchased 140 cords of wood and ten cords of props, being in all 150 cords.

The evidence shows that there were some props, and also wood, cut inside what the witnesses call the "timber line," which appellant does not claim he purchased, but he contends that he bought all the wood and props remaining on what they call the "cleared land," while appellants, David and Selma Wiener, insist he only purchased what remained on about thirty-five or forty acres, and including only about 150 cords of wood and props.

On final hearing the court found that appellee purchased only 140 cords of wood and ten cords of props, and that it had all been removed and taken away by Mrs. Wiener or her agents, except twenty-two and a half cords of wood and four and one-half cords of props, and that she was chargeable with the amount taken at the price she was to receive for the same at the place of delivery, making no allowance for the cost of hauling or shipment, on the ground that by her wrongful act she had caused a confusion of goods and must respond accordingly. The court further found that the value of the wood and props which appellee Selma Wiener had wrongfully taken was \$420.84, and decreed that the Joliet Steel Company, out of the moneys in its hands due to Selma Wiener for wood, should pay to the clerk of the court for the use of appellant, said sum of \$420.84, and two-thirds of the taxable costs, and ordered that the remaining one-third of the costs should be taxed against appellant. Appellant being dissatisfied with the decree, prosecutes his appeal to this court and assigns various errors, but his principal complaint is that the amount of the decree in his favor is not large enough, insisting that the court should have found that he purchased 550 cords, two-thirds of which were props, and that he was entitled to a decree accordingly.

Appellees, David and Selma Wiener, have assigned cross-errors, the most important of which is, that this was not a case properly cognizable in a court of equity; that the appel-

lant had a complete and adequate remedy at law, and so has mistaken the proper forum to which he should apply to have his rights ascertained. If this point is well taken, it would be unnecessary for us to enter upon an investigation or discussion as to the merits of the case, or as to appellant's assignment of errors.

In her answer to the bill, appellee Selma Wiener demurs thereto, and insists upon the same advantages as if she had specially demurred to the bill, and hence it can not be said she has waived her right to be heard upon this question. The point is now made and insisted upon, and we must determine it, although we are not favored with any authorities upon either side of the question in the briefs or arguments of counsel. In fact, counsel for appellant do not refer to, or discuss the question at all.

It is a well recognized principle of equitable jurisprudence that a court of chancery will not entertain jurisdiction where the party has a complete and adequate remedy at law. Applying that principle to the case at bar, it seems to us to be decisive of the question. Upon the facts, it is simply an attempt to collect from the appellee, Selma Wiener, the value of certain wood and props which appellant claims were his property, and which appellee, Selma Wiener, wrongfully took and disposed of for her own use and benefit. She is the person sought to be charged, and the only apparent reason for coming into a court of equity is found in the allegation that she is insolvent, and that the money due her for the wood and props sold, is still in the hands of her co-defendants, the Steel and Coal companies. But appellant does not support even this allegation by a particle of proof. On the contrary, we think the proofs show that she is possessed of property amply sufficient to render her responsible for any judgment which appellant would be likely to obtain against her for, or on account of, the matters in controversy. We do not find in the evidence any special reasons showing why this case should be an exception to the general rule, and we do not perceive why the appellant has not a complete and adequate remedy at law. Even were it conceded

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that the allegation of insolvency, if sustained, would authorize appellant to invoke the aid of a court of chancery, yet he must fail, because he made no effort whatever to sustain it.

But we do not understand that the mere insolvency alone of a defendant is sufficient to warrant the granting of an injunction to restrain the commission of a threatened trespass. High on Inj. (1 Ed.) 21.

Much less should the mere allegation of insolvency be permitted to enable a party to come into a court of equity to recover damages for a trespass already committed.

In effect, this action amounts to nothing more than an attempt by bill in equity to recover damages for trespasses committed by defendant, Selma Wiener.

Under the authorities, we think this can not be permitted. Long v. Baker et al., 85 Ill. 431; Wrigden v. Goe, 50 Ill. 459; Winkler v. Winkler, 40 Ill. 179.

The decree will be reversed and the cause remanded to the Circuit Court, with directions to dismiss the bill without prejudice.

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City of Peoria v. Amelia Gerber, by her Next Friend.

1. CITIES AND VILLAGES—*Their Duty as to Streets.*—It is the duty of a city to maintain its streets in a safe condition, and such duty can not be evaded or delegated to others, and if a city by its direct act or authority causes or permits its streets to get out of repair and neglects to use reasonable diligence to repair them after notice, it is liable for injuries received by any person on account thereof, while such person is exercising ordinary care.

2. NEGLIGENCE—*Traveling on Defective Streets.*—Traveling upon a street by one having knowledge of dangerous defects therein, does not necessarily constitute negligence.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

W. T. IRWIN, city attorney, for appellant.

WINSLOW EVANS, attorney for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an action on the case by appellee against appellant to recover damages for an injury received by her, her ankle and foot being sprained and dislocated, and the tendons and ligaments scratched and broken, the said injury being caused by one of the streets in the said city of Peoria being out of repair.

The cause was tried by a jury and resulted in a verdict for the appellee of \$2,500.

The accident took place on the 27th day of October, 1894, about the middle of block 800, on North Adams street, in the city of Peoria.

The Central Horse Railway Company had its railway track in the middle of the street, kept there by permission of the city of Peoria, and the said Central Railway Company was operating and maintaining its street railway track on said street on the day of the accident, and had been for some time.

Adams street, in said city, runs northeast and southwest. Brick paving had been laid by the city or contractors on the northeast side of the street, between the outer rail of the said track and the curb line from Hamilton street, many blocks above and beyond where the injury occurred, and barriers removed and the street opened for travel.

The Central Railway Company had removed the paving from between the rails of the track and from the center space between the two tracks several weeks prior to the injury.

The railway company had also placed its tracks at the grade required by the city ten days to two weeks before the injury to appellee, of all which the city had due notice.

The city and the Central Railway Co. were in a dispute as to whose duty it was to repave the street between the rails and between the two tracks, the city contending that

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it was the duty of the railway company and the railway company that it was the duty of the city, so neither made the necessary repairs.

The city had due notice that the railway company did not intend to repair the street on October 2, 1894. A resolution was introduced into the city council on the 26th day of October ordering the said tracks of the railway company to be removed, reciting in the resolution that the excavations, gutters and trenches were dangerous to the public safety and prevented a reasonable use of the street, and that they had become a public nuisance.

The evidence shows that on the afternoon of the 27th day of October, 1894, appellee, with Preston Clark, was in a covered cart drawn by one horse and was driving along between the car tracks and the curb on the brick pavement, the cart being about three feet from the car track, and after they had gone to about the middle of the 800 block or a little beyond it, the horse which Clark was driving became alarmed and frightened, apparently at an approaching car. At this he checked, shied to the left, surged a little, started again, surged on around to the left, and as he did so, Mr. Clark restraining him with the lines, he backed the cart, the right wheel of which first fell into the ditch between the two rails of the track, then the horse, surging back, his rear feet also fell into the excavation. This served to confuse and further frighten him. He made another lunge, swinging around to the left still further, until his head was turned in the opposite direction from the one in which he had been going, and in doing so he forced the left wheel over the further rail of the track and into the center space between the two tracks; in lunging he caught a shoe of one of his hind feet in the iron chair which rests on the tie and supports the rail about three inches above the tie. Thus catching his foot in lunging he was thrown, or fell, the shoe being drawn entirely from his foot. The fall of the horse pitched the body or bed of the cart forward and the front down, and thereby the appellee was thrown from the cart onto the rail or track just beyond the middle space, and

from the fall her limb and ankle were severely injured, so much so that she could not use it at all when she got up. After she had scrambled across the street and the horse had been righted and again hitched to the cart she had to be carried across the street and placed in the cart to be taken home.

The injury to appellee's ankle was very severe, and she had no power herself to straighten the foot. It was two weeks after the injury before the swelling could be reduced sufficiently to put it in a plaster cast, and when it was put in, it remained there until Christmas of that year, so that the ligaments might reunite and the foot be kept straight while this union was going on. It also appears that the ankle will never be as good as before, will always be weak, and if she makes a misstep or stumbles, the foot will be likely to turn under and throw her down.

Appellee was unable, before the following April, to return to where she was attending school.

It is contended by appellant that the evidence was not sufficient to support the verdict; that the damages were excessive, and that the court erred in giving and refusing instructions.

We think the evidence was ample to show the negligence of the appellant in not keeping the street in proper condition.

The city had actual notice of its condition for a long time and failed to repair it or cause it to be repaired, and in fact had actual notice of the dangerous condition of the street, and declared by its own resolution, that it was in a dangerous condition.

It was the duty of the city to maintain the streets in a safe condition, and such duty could not be evaded or delegated to others, and if the city by its direct act or authority caused or permitted the street to get out of repair, and it failed to use reasonable diligence to repair it after notice, it would be liable for injuries received by any one on account thereof while such person was exercising ordinary care. *City of Springfield v. Scheevers*, 21 Ill. 203.

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The fact that the horse became frightened, if without the fault of the driver, would be no bar to appellee's recovery. *City of Rockford v. Russell*, 9 Ill. App. 229.

We see nothing wherein appellee or Preston, the driver, was negligent, or in want of the exercise of ordinary care at the time of the accident, or that they were negligent in driving upon the street under the circumstances. *Wabash Ry. Co. v. Brown*, 152 Ill. 484; *P., Ft. W. & C. Ry. Co. v. Callighan*, 157 Ill. 406.

The question of whether appellee and her driver were negligent in driving on that street, was also a question of fact for the jury. *Village of Clayton v. Brooks*, 150 Ill. 107.

We find no fault with the jury in finding the appellant guilty in the manner charged in the declaration. The amount of damages is also a question for the jury, and we do not think that they were so excessive under the circumstances and evidence in the case that the Circuit Court should have interfered. The injury was very serious and permanent in its character.

The third and fourth instructions given for appellee are complained of by appellant. The third instruction is a little obscure in telling the jury that if the city of Peoria, "knowing such condition of the street, neglected to put the same in reasonable safe condition within a reasonable time before the accident," etc., they should find the defendant guilty.

That instruction means reasonable time after notice, and, of course, it must be before the accident, and we think the jury could not have been misled, and especially as the evidence shows that the city had ample time to repair the street after having ordered it torn up.

We see no fault to find with appellee's fourth instruction given by the court, nor in the refusal of the court to give appellant's eighth, ninth and tenth refused instructions.

The jury was fully and fairly instructed on both sides.

Seeing no error in the record the judgment of the court below is affirmed.

William McBride v. Charles H. Steiner.

1. FINDINGS BY THE COURT—*Presumptions in Favor of—Weight Accorded to.*—Where a case was tried by the court without a jury, and no propositions of law were submitted and no objection made to any part of the evidence, a court of appeal will presume that the trial court properly applied the law to the facts, and that its finding was the result of its deliberate judgment upon the facts, and will give such finding the same weight accorded to the verdict of a jury.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Henry County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

GRAVES & BROWN, attorneys for appellant.

DUNHAM & FOSTER, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit on a promissory note for \$500, executed by appellant to appellee on January 1, 1894, and upon which there had been paid \$201.98 on March 19, 1894. By agreement of parties the cause was tried by the court without a jury, all questions of law being reserved. There was a finding and judgment by the court in favor of appellee for \$331.43 and costs.

The note was given as part of the purchase price for a farm sold by appellee to appellant, and there is a conflict in the evidence as to whether the whole purchase price was \$8,000 or \$8,300. If it was \$8,300 then the whole of the \$500 note must be paid to make up the entire purchase price; but if only \$8,000 then the payment of March 19, 1894, of \$201.98 would fully pay it. There was a mortgage on the land which, by the terms of appellee's deed to appellant, the latter assumed and was to pay, but he insists that appellee agreed to pay the interest on this mortgage to January 1, 1894, and

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that the only amount appellant was to pay on the mortgage was \$5,650. The amount due, however, and which was actually paid by appellant was \$5,948.02. Appellant therefore insists that the consideration of the \$500 note failed, or rather that there was no consideration for the note, to the extent of the difference between \$5,650 which he was to pay, and the sum of \$5,948.02 which he did pay.

The evidence of appellant's son corroborates him as to the agreement concerning the amount he was to pay. And yet, in the state of the evidence, we can not say the court came to a wrong conclusion. There may have appeared to the court below reasons why he should take the testimony of appellee as against that of appellant and his son, as to the agreement to pay interest on the mortgage to January 1, 1894, corroborated as appellee is on that point by the provision in the deed whereby appellant assumed payment of the entire mortgage without reservation.

No propositions of law are saved for our consideration. All evidence seems to have been received without objection, and we must presume that the court properly applied the law to the facts, and that its finding was the result of its deliberate judgment upon the facts, which is entitled to the same weight as should be given to the verdict of a jury.

We can not say the judgment is erroneous, as the record stands, and it will be affirmed.

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**Frances K. Alexander et al. v. John V. Emmett and
Illinois Trust and Savings Bank, Executor, etc.**

1. **FRAUD—Misrepresentations Do Not Always Amount to.**—In an action for fraud and deceit in the sale of land, the plaintiffs charged that the defendant had undertaken to secure certain land, and to sell it to them at cost, and that he had wrongfully charged them a profit. A proposition of law, submitted by the defendant, stating "that a misrepresentation of the amount paid for the land gives the plaintiffs a right of action against the defendant," was modified by adding, "provided a fiduciary relation is shown to have existed between the parties at the

time of the transaction." *Held*, that the modification was properly made.

2. PROPOSITIONS OF LAW—*Should be Definite and Complete*.—A court trying a case without a jury may properly refuse to hold as law a proposition which is indefinite and incomplete.

Trespass on the Case, for fraud and deception. Appeal from the Circuit Court of Whiteside County; the Hon. JOHN D. CRABTREE, Judge, presiding. Heard in this court at the May term, 1896. *Affirmed*. Opinion filed December 9, 1896.

WM. BARGE, attorney for appellants.

WALTER STAGER, attorney for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by the appellants, Frances K. Alexander, Aaron A. Wolfersperger, Herman Sturtz and L. Edwin Brookfield, originally against Walter S. Dray and John V. Emmett, in the Circuit Court of Whiteside County, July 9, 1891.

Summons was served on appellee Emmett July 9, 1891, and on Walter S. Dray July 13, 1891, the first in Whiteside county and the second served in Cook county, Illinois.

All the appellants and appellee Emmett, were residents of Sterling, Whiteside county. Appellee Walter S. Dray was a resident of Chicago, Cook county, Illinois, as also the present party, the Illinois Trust and Savings Bank, executor of the said Dray, deceased.

The action is in case of fraud and deception charged, on the part of Walter S. Dray, in the sale of one-third of twenty acres of land situated in Chicago, claimed to have been perpetrated by said Dray upon the appellants, assisted by John V. Emmett, one of the appellees, and also a joint purchaser from Dray, with the appellants, of the said land.

After several terms of court a jury was waived and the cause was tried by the court without a jury. The case was heard by the court March 1, 1894, before the death of Dray. The latter died August 28, 1894.

The death of Dray was suggested, and that he had died

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testate, and that the Illinois Trust and Savings Bank had been appointed executor; and it was asked that the said bank be substituted as defendant, which was done by the court. This was November 13, 1894.

Thereupon, on the same day, the plaintiffs filed a new count against the estate of Dray alone. On the 14th of November, 1894, summons was issued for Dray's executor and it was served November 23, 1894.

On May 27, 1895, the court found the issues for the defendants. Motion for a new trial was made by the appellants and overruled by the court and judgment entered against them for costs.

From that judgment an appeal was taken to this court.

John W. Alexander was the husband of Frances Alexander, and did all the negotiation for his wife, in the purchase of the land hereafter mentioned, from Dray and Frances Alexander; the appellant knows nothing about the transaction except what she learned from her husband and others.

It appears from the evidence in the case that on the 16th and 17th days of May, 1890, in the office of Walter S. Dray, in Chicago, a trade was agreed upon between a portion of the appellants and the appellees Emmett and Walter S. Dray, for the purchase, by the former from the latter, of a one-third interest of twenty acres of land situate on 79th street, in the city of Chicago, for \$26,666.64, or \$4,000 per acre—\$9,000 to be paid in cash and the balance in one, two and three years. On the 20th of May, 1890, the appellant Wolfersperger appeared in Dray's office, in the city of Chicago, representing himself and all the other purchasers, and consummated the sale and took Dray's contract, paid the earnest money, gave a portion of the purchasers' notes, and arranged for giving the balance of the notes and purchase money to Dray.

The notes were afterward given, notes subsequently paid in full, and a deed taken from Dray and Dray's grantor.

The purchasers from Dray, the next spring after the purchase of the land, disposed of it and sold it at \$4,750 per acre, an advance of \$750 per acre.

The charge which is relied upon in the declaration for recovery in all the counts except the last, is, that Walter S. Dray, and John V. Emmett, who was pretending to act with the appellants but was abetting Dray to deceive them, made various representations, by Dray, to the effect that he had a friend who had a third of this land and that he would take a third himself; another, that he had a friend who would take a third; another, that he had two-thirds, which was more than he could carry and wanted some one to take a third; and that for the exclusive privilege of selling the land he would get it for them for just what it cost him; others, that in consideration of this privilege he would let them have the land for what it cost him, which he said was \$4,000 per acre, when in fact it only cost him \$3,000 per acre. He said there was "big money" in the land and that he "could sell it for them for \$5,000 per acre before snow flies." The amended count in the declaration was against Dray's executor alone. At this time Dray was not the owner of the land.

On the 10th day of the same month, April, Dray, four days after the making of the representations, obtained a third interest in it by assignment from Bauer, assignee of a contract to him from one Neether, original owner of the land, and that the appellants would not have purchased the land of Dray save for the false representations, and had they known that the land only cost \$3,000 an acre, and that they did not know that the land only cost \$3,000 per acre until about a year after the contract was signed by Wolfersperger and Dray, and shortly before the commencement of the action.

The gist of the action is fraud and deceit; that Dray and Emmett conspired together to deceive them, and that, relying upon their representations, they purchased the land.

The question as to whether Dray made the representations claimed was hotly contested on the trial, the appellants depending entirely on their own testimony to support the allegations of the declaration. The defendants made absolute and emphatic denial that Walter S. Dray ever

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made the representations claimed, or undertook to purchase the land for the purchasers for what he could get it for, or sell it to them for what he had paid for it. They were supported in this contention by the testimony of Walter S. Dray and appellee Emmett, and Homer Dray and one Garnett, who wrote the contract between Dray and Wolfersperger, and corroborated by the surrounding circumstances of the case.

It appears from the evidence that Emmett, Alexander, Sturtz, Brookfield, Dray, and his nephew Homer Dray, were present together in Dray's office on the 16th of May, 1890, and Wolfersperger also claims to have been there, and states what he claims to have been the conversation; that, among other things, Dray agreed to sell them the land for what it cost him; but we think the evidence pretty clearly shows that Wolfersperger was not there at all on that occasion. His memory in regard to a number of instances which he testifies to, and dates, seems to be badly at fault. He was undoubtedly at home in Whiteside county on the 16th of May, 1890, and also on the 17th of the same month. He also testified that on the 16th Dray took him out and showed him the land, but finally admitted it was not on the 16th, but on the 6th of the same month. Brookfield also made a like mistake.

So that upon the whole testimony we think the court below was fully justified in finding that Wolfersperger was not in Chicago on May 16th and 17th, 1890, and in disregarding his testimony as to what was said or done there on that day. Alexander and Sturtz and Brookfield state in substance that Dray represented that he would take a third interest himself, and he wanted the Sterling people to take a third, and that he would take a third if the Sterling people would, and that as to the price the owner could not be induced, he thought, to take less than \$4,000 an acre. If he could, "why, it would be that much less," and that the remuneration Dray was to have, that he was going to have a third of it and full control of the sale of the whole, and that his commissions would be the usual commissions.

Brookfield testified that Dray said among other things that he thought it would sell for \$5,000 an acre "before snow flies," and he thought he could buy the land for \$4,000 an acre, and that he would let them in on "the ground floor," as he expressed it, and that he would let them have it for just what it cost him. Sturtz testified to substantially the same thing.

This testimony was completely contradicted by Walter S. Dray, and by Emmett and Homer Dray. Emmett testifies in substance that Dray told them at the time that he had a third interest in a contract that was on the property; that the contract was for \$60,000, and that he would sell his one-third interest at the rate of \$80,000 for the whole tract, or \$4,000 per acre. He said that it cost him \$20,000. Homer Dray states the same thing; as did also Walter S. Dray. And the evidence clearly shows, that on the 10th of May, six days before this purported conversation, Dray had become the purchaser of a one-third interest in this property for \$20,000.

It appears more than probable, that if these parties ever had any conversation with Dray about his acquiring an interest in the land, it must have been on the 6th of May instead of the 16th; and if appellants' witnesses were so badly mixed up in dates and circumstances, it is more than probable that they obtained a false impression of the whole matter. Besides this, it is expressly testified to by Emmett that he informed Wolfersperger on the 20th day of May, when he was preparing to go to Chicago to close up the deal with Dray, just what Dray was giving for the land; that Dray owned one-third interest in the tract, for which he paid \$20,000, and that Dray had agreed to sell it to appellants and himself at the rate of \$4,000 an acre, and that there was \$9,000 of a cash payment. Wolfersperger denies this statement.

When Wolfersperger arrived in Chicago on the 20th day of May, 1890, the trade was closed up between him and Dray in the presence of Garnett, and Dray and Garnett both testify, contradicted by Wolfersperger, that the whole

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matter was explained to Wolfersperger and the assigned contract that Dray held shown to him, and it was stated to him just what Dray was to receive (his profits), \$1,000 an acre and the balance was to go to the party from whom Dray purchased the land.

Dray testified that he was asked by Wolfersperger at the time to make out a statement of the sale and the contract and to send it to Sterling. Thereupon Dray did make out a statement on the 21st of May, 1890, in which he fully explained the sale and his interest in it, which was \$6,666.66, and which clearly showed that Dray had only paid \$3,000 an acre for the land. Emmett testified that he showed this statement to Wolfersperger, which Wolfersperger denies.

There are many other facts and circumstances in the case tending to show that the appellants knew all about it, and what Dray gave for the land before the contract was entered into. We think that the court was clearly justified in finding in favor of the defendants.

Even if it were a doubtful question in our mind where the preponderance of the evidence laid, we would not be justified in reversing the judgment unless the finding of the court was manifestly against the weight of the evidence.

The court below did not err in modifying the appellants' fourth proposition of law, and even as modified it did not contain the law, it omitting the essential element that the plaintiffs must rely upon the false representations.

The proposition was that "a misrepresentation of the amount paid for the land gives the plaintiffs a right of action against the defendants." The modification that was added to this by the court is as follows: "Provided fiduciary relation is shown to have existed between the parties at the time of the transaction."

The modification was correct as far as it went, and the error committed by the court was in favor of the appellants in not refusing the holding entirely, and in not modifying it sufficiently. Therefore the appellants can not complain of this error.

We think the court properly refused appellants' sixth

proposition. It was too indefinite and incomplete, and besides, generally, the burden of proof was on the plaintiff.

The proposition is as follows: "The burden of proof is on defendants to prove the plaintiffs knew what Dray paid for the land."

The court committed no error in holding the defendants' first, second and fourth propositions to be law.

When the court marked these holdings the declaration had not been amended and they were only applicable to the declaration as filed January 22, 1892. The court did not err in its rulings on the admissibility of evidence to the injury of the appellants nor in refusing to grant a new trial. Seeing no error in the record the judgment of the court below is affirmed.

Judge CRABTREE, having tried the case in the court below, took no part in the decision here.

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Manufacturers & M. M. I. Co. v. Maria Zeiting, Executrix, etc.

1. **INSURANCE—False Representations by Insured.**—In making a contract of insurance, the parties must act in good faith, and the assured must truthfully answer questions asked as to the value and condition of the property sought to be insured, yet, where a false representation is made, it must be shown, to avail as a defense, that the representation was a material one to the risk.

2. **WORDS AND PHRASES—"Shall Render."**—An insurance policy provided that in case of loss the insured "shall render proof of loss within," etc. *Held*, that mailing the necessary proofs within the time required was a sufficient compliance with the terms of the policy, although they were not delivered at the office of the insurance company until after the expiration of the time allowed.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of Winnebago County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Mr. Justice CRABTREE, dissenting. Opinion filed December 9, 1896.

WILLIAM MARSHALL and A. D. EARLY, attorneys for appellant.

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R. K. WELSH, J. GARVER and A. E. FISHER, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought on a fire insurance policy, issued by appellant to Valentine Anthony Zeiting, on the 10th of August, 1893. Two thousand dollars was upon a five-story stone and frame flouring mill, and \$1,000 upon the mill machinery, situated on the Monocacy river, State of Maryland. Zeiting was, at the time the policy was issued, residing in Missouri, and the mill was in charge of his son, Christian J. Zeiting, who was the agent of his father, and who applied for and obtained the insurance.

The mill and machinery were totally destroyed by fire September 3, 1893. September 30, 1893, Valentine died, and on the 26th of October following, letters testamentary were issued to appellee. On the 1st of November, 1893, the son mailed from Maryland proofs of loss, addressed to appellant at its home office, Rockford, Illinois, but the same were not received until November 3d, which was more than sixty days after the fire. The policy required the insured in case of loss, to render to the company sworn proofs of loss within sixty days.

On the 10th of November, George S. Roper, secretary of appellant, wrote C. V. S. Levy at Frederick, Maryland, who seems to have been interested in the mill property as mortgagee, and who was representing appellee as attorney, acknowledging receipt of proofs of loss, but objecting to them because they contained no detached description of the property destroyed, or certificate of justice of peace as required.

Appellee refusing to pay, this suit followed, resulting in a judgment in favor of appellee of \$2,350.

It is urged that in the application for insurance, there was such misrepresentation of the property in regard to its age as was sufficient to avoid the policy. The false representation consisted in the statement that the mill was about

"twenty or twenty-five years old," when, as a matter of fact, it was erected prior to 1830.

While it is true that in a contract of insurance the parties must act in good faith and the assured must truthfully answer the questions asked as to value and condition of the property proposed to be insured, yet where a false representation is made it must be shown, to avail as a defense, that the representation was a material one to the risk. *National Bank v. Insurance Co.*, 95 U. S. 673; *Redman v. Hartford Fire Ins. Co.*, 47 Wis. 89; *Grand Lodge A. O. U. W. et al. v. Bilcham*, 145 Ill. 308; *Howard v. Cornick*, 24 Ill. 455.

The evidence shows that the mill was practically rebuilt in 1867, and was a substantial structure. The misrepresentation, therefore, was not material.

It is contended that no action can be maintained because proofs of loss were not rendered to the company within sixty days after the fire. The proofs of loss were mailed within the sixty days but did not reach the company, and could not in due course of mail within the sixty days limited by the policy. The language employed in the policy is "shall render," etc.

By the term "render," it is insisted on behalf of appellant, is meant "deliver at the office of the company;" and that merely mailing proofs of loss within the time limited does not fulfill the requirement. We are not disposed to place a construction so narrow on the provision. We think mailing of proofs of loss within the sixty days sufficiently met the requirement.

It is unnecessary to discuss the instructions or other matters argued in the briefs. We feel that in this case substantial justice has been done and that the judgment should be affirmed.

Mr. Justice CRABTREE dissents.

Hugo Zachgo et al. v. George Frerichs.

1. FINDINGS BY THE COURT—*Usually Conclusive.*—The findings of a judge who saw the witnesses and heard them testify are conclusive, unless clearly against the weight of the evidence.

Transcript, from justice of the peace. Appeal from the Circuit Court of Iroquois County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

KAY & KAY, attorneys for appellants.

S. W. KUTTRUFF, attorney for appellee; PAYSON & KESSLER, of counsel.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellants brought suit before a justice of the peace, to recover for one-third of 1,077 bushels of corn raised on their farm by appellee, who was their tenant under a written lease containing various inharmonious and conflicting provisions. There was a recovery before the justice for \$182, but on appeal to the Circuit Court and a trial by the court without a jury, the issues were found for appellee and judgment rendered against appellants for costs. As no legal principle is involved, we do not deem it necessary to make an extended statement of the facts. The question before the court below was one of fact entirely, not a single legal proposition being raised. Counsel for appellants do not point out in their brief anything tending to show that the court erred in the admission or exclusion of evidence, but they insist that the court misconceived the evidence and found against its weight.

The court saw the witnesses and heard them testify, and we think was fully justified in finding as it did. The evidence as contained in the record shows very little, if any, merit in appellants' claim against appellee.

We think the judgment was right and it will be affirmed.

H. Meyer Boot and Shoe Mfg. Company v. John Ward.

1. **LIENS**.—*For Labor and Material*.—A person who furnishes labor and material in caring for and curing hides belonging to another person, at his request, has a lien upon the hides for the price of the labor and material furnished.

Replevin.—Appeal from the Circuit Court of Stephenson County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

JAMES H. STEARNS, attorney for appellant.

M. STOSKOPF, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was an action in replevin, brought by appellant to recover possession of a lot of cow hides, calves' skins and sheep pelts, held by appellee upon a claim that he was entitled to them by virtue of a lien for salting and curing them.

Appellant failed in its suit, and brings the case here by appeal, asking a reversal, because the judgment is against the law and the evidence, because the court permitted improper evidence to go to the jury, and improperly instructed the jury.

The hides were delivered at the tannery of appellee by butchers, under a contract between appellant and one Herman Hanson, who, at the time, had control of the tannery under a lease from appellee. Under this contract it was arranged that local butchers should bring the hides, skins and pelts to the tannery, where Hanson was to take them, cure them, and deliver the leather to appellant for forty cents per skin and sixty cents per hide.

A number of hides and skins were delivered to Hanson by butchers, and he undertook to cure them under this contract, and did deliver several batches of leather to appellant,

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for which he was paid. After receiving the hides, skins and pelts in controversy, Hanson was taken sick and abandoned the contract and the tannery. Appellee took charge of the hides and skins, furnished a large quantity of salt, and devoted considerable labor to curing them. He claims that his labor and the salt furnished for that purpose was at the instance of agents of appellant. When the lot was demanded of him he refused to deliver them to appellant until he should first be paid for the salt and labor furnished.

It is not denied that appellee was instructed by appellant's agents to take care of the hides and cure them, but it is claimed by them, that at the time they did so they understood appellee was in the employ of Hanson. Appellee was not in the employ of Hanson at the time, and supposed when he did the work and furnished the salt, he was doing so for appellant. We think the circumstances were such as to justify appellee in the conclusion that he was employed by appellant, and that he had a lien for the labor and salt bestowed upon the hides. We do not think, however, that he was entitled to any lien for storage. After paying appellee the amount due him for labor and salt, appellant would be entitled to the possession of the property, and not until then. Judgment affirmed.

H. Clay Merrit v. The People of the State of Illinois.

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1. *GAME LAW—Possession or Sale of Birds Killed in Another State.*—The provisions of the game law, which make it unlawful for any person to sell, expose for sale or have in his possession for the purpose of sale, certain animals, fowls and birds therein mentioned, at certain seasons, apply to a person who has in his possession any of such animals, fowls or birds, although they were killed outside of this State and have been shipped to him in this State.

Information, for having possession of game for the purpose of sale. Error to the County Court of Henry County; the Hon. A. R. Mock, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

BLISH & LAWSON and C. C. WILSON, attorneys for plaintiff in error.

M. T. MOLONEY, Attorney-General, and EMERY C. GRAVES, State's Attorney Henry county, for defendant in error; T. J. SCOFIELD and M. L. NEWELL, of counsel.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was convicted upon information in the County Court for having in his possession, for the purpose of sale, on the 18th of July, 1895, quail, prairie chickens and ducks, contrary to the provisions of Chap. 61, Rev. Stat., known as the Game Law. He was fined \$805. He was at that date in the cold storage business at Kewanee, Illinois, and it is not disputed that he had a large quantity of game in his warehouse, and sold and shipped to one S. L. Hough, at Hinsdale, Illinois, 161 birds of the kind named. But he claimed in the court below, as he does here, that he is not amenable to the statute, for the reason that the game was not killed in Illinois, but was shipped to him from points without the State during the months of November and December, 1894, and January, 1895.

The question presented for our decision is whether game of the kind mentioned, killed in and imported from other States, is within the inhibition of the statute.

It is contended by counsel for plaintiff in error that a fair construction of the statute—which makes it a criminal offense to have in one's possession, for the purpose of selling, any of the wild animals, fowls, or birds which it is unlawful to kill at certain seasons of the year—would limit the words in the statute to those animals, fowls, and birds intended to be protected, viz., those within the State of Illinois.

It is contended that while the law guards against the possible invasion of it by prohibiting the possession and selling of the game, it was only intended to make the possession *prima facie* evidence of the violation of the act, and that where it is made to appear that a person charged with

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a violation came into possession of the game as a consignee, and that the game was killed in another State, he is not amenable to punishment.

To hold as contended for would bring us in direct conflict with the views of our Supreme Court, as expressed in the opinion of the late Justice Schofield in *Magner v. The People*, 97 Ill. 320. In that case the court held that the statute applies to a person who has in his possession and sells quails killed in the State of Kansas, and which have been shipped to him in this State. The various provisions of the game law, and the purpose of its passage, are elaborately considered in the opinion.

It is decisive of this case, and it is only necessary to refer to it in support of our holding that the plaintiff in error has been rightfully convicted.

Judgment affirmed.

John McGilvray v. George Springett.

1. *SLANDER—Words Spoken in Relation to a Known Act.*—In a suit for slander, if the words proven to have been spoken by the defendant of the plaintiff, were spoken about and in relation to a known act, and that act in law is not a felony, which is known to the bystanders, the defendant is not liable.

2. *JURORS—Relationship to an Attorney in a Case.*—The mere fact that one of the jurors in a case was a brother-in-law of one of the attorneys for the successful party is not ground for a reversal where the record does not show that any question as to his competency was raised on the trial.

Trespass on the Case, for slander. Appeal from the Circuit Court of Iroquois County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

C. H. PAYSON and NELLY B. KESSLER, attorneys for appellant.

HILSCHEE & GOODYEAR, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellant sued appellee in an action on the case for slander. The declaration contained but one count, and the slanderous words charged were: "You stole the town money and they caught you at it, and made you pay it back, and I can prove it. You are not honest, and everybody knows it. You won't pay your debts."

Appellee pleaded not guilty, and upon a trial by jury there was a verdict for appellee, and a new trial being refused, there was judgment against appellant for costs, and he brings the case here by appeal.

It is insisted by appellant that the verdict is against the evidence, and was the result of passion and prejudice, but we are of the opinion it was the only verdict which could have been sustained under the facts appearing in the case. The words charged as slanderous were not understood by the bystanders as imputing the crime of larceny to appellant, nor as intended to charge him with the offense of stealing, in a criminal sense, but were understood to mean that appellee intended to charge appellant with having presented an irregular or fraudulent bill to the board of town auditors for thirty dollars, when he was entitled to but twelve. If this was the sense in which the words were understood by the bystanders, and were so intended by appellee, they were not slanderous within the legal acceptance of the term, and an action therefor would not lie.

In the case of *Ayres v. Gridley*, 15 Ill. 37, the court refused to instruct the jury "that if the words proven to have been spoken by the defendant of the plaintiff were spoken about and in relation to a known act, and that act in law is not a felony, which is known to the bystanders, they will find the defendant not guilty." The refusal of the court so to instruct was held to be error, for which the judgment was reversed. The principles announced in that case are decisive of the case at bar.

Counsel for appellant insist that all of the bystanders did not understand the charge of stealing money of the town,

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to refer to this bill presented to the board of town auditors, and we are earnestly referred to the testimony of the witness, Lomer Munts, Jr., and Anderson on that point, but a careful examination thereof fails to satisfy us that they understood the words used in any different sense than the others who were present. All seem to have understood the charge made, as being in reference to the bill presented against the town, and not as imputing an actual larceny of money.

The mere fact that one of the jurors was a brother-in-law of Mr. Goodyear, who, although one of the counsel for appellee, appears to have taken no part in the trial, is not sufficient to require a reversal. The record does not show that any question as to his competency was raised on the trial, and it is too late to make the objection for the first time in this court.

In his cross-examination appellee volunteered the statement that appellant had "hired two wife beaters to whip him," and this is now complained of, but we do not find in the record that any objection was made at the time, nor any motion made to strike out the testimony, and we can not see that any error was committed by the court which can be availed of now. The judgment was right under the evidence and must be affirmed.

City of Peoria v. Fruin-Bambrick Construction Co.

1. **ARBITRATORS**—*When Decisions by, Are Not Binding.*—Where the parties to a construction contract agree upon a third party as an arbitrator, to settle all disputes between them as to the work and material, and that payments shall be made only upon his certificate, they are bound by his decision. But an exception to the rule is made where the work and material fulfill the requirements of the contract, and the dispute is merely captious, and the refusal of the arbitrator to certify is fraudulent or unreasonable.

2. **JUDGMENTS**—*Ordering Payment from a Particular Fund.*—Where a claim against a city is payable out of a particular fund, it is proper to render a judgment directing that the damages and costs recovered be

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paid only out of money belonging to such fund in the hands of the city treasurer, or that may hereafter come into his hands.

8. COSTS—*On Appeal Where Judgment is Modified.*—A court of appeal will not assess the costs of an appeal against the appellee on account of a mistake in the calculation of interest, where the attention of the trial court was not called to the mistake nor the appeal prosecuted on account of it.

Assumpsit, for work and material. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed in part. Opinion filed December 9, 1896.

W. T. IRWIN, city attorney, for appellant; STEVENS, HORTON & ABBOTT, of counsel.

ARTHUR KETHLEY, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$55,729.13, which appellee recovered against appellant, in an action of assumpsit brought to recover for work and material furnished in laying asphalt pavement on Perry street, in the city of Peoria.

The declaration contained only the common counts, and the only pleas filed were non-assumpsit and *nul tiel corporation*.

The first contention urged by appellant is, that there can be no recovery under the common counts, for the reason that the work was undertaken under a special contract which required certain acts to be performed by certain of the city authorities as a condition precedent to the right of recovery, and that those acts had not been performed.

The ordinance under which the pavement was laid provided for the payment to be made by special assessment according to the frontage of property upon the street; the division of the special assessment into seven annual installments; for the issuing of bonds in anticipation of the collection of the deferred installments; that samples of the pave-

ment mixture, used each day, should be furnished to the city engineer for inspection; that the work should be done to the satisfaction of the city engineer and commissioner of public works; that the estimates of the engineer, as approved by the commissioner, should be the account by which the amount of work done should be computed, and that work should not be paid for until accepted by the commissioner.

It was also provided that the material used should be equal in quality to the best Trinidad asphaltum obtainable from Pitch Lake, in the Island of Trinidad.

The contract was awarded to appellee on a bid of \$1.85 per square yard as against a bid of \$2.26 by the Warren-Scharf Company. After appellee had executed its bond for faithful performance and had done considerable work, the commissioner of public works on the 28th of August, 1894, notified appellee by letter that he had made an inspection of the asphaltum to be used by appellee, and that it did not fill the requirements of the contract. He notified it not to place any of the asphaltum in its factory or warehouse upon Perry street as part of the improvement, and that if it did so the work would not be accepted. Notwithstanding the notice, appellee went on with the work and completed the laying of the asphaltum. There was no supervision by the city engineer, no estimate of the work made at any time by him, and no acceptance of it by the commissioner of public works. It is conceded that where there is a special contract, the plaintiff may recover for work done and labor and material furnished under the common counts, if the contract has been fully performed by him, and nothing remains but for the defendant to pay the money. Such is not appellee's case however, it is insisted, because the contract required the work to be done under the supervision of the city engineer, and to the entire satisfaction of that officer and the commissioner, and that they should accept the whole work and so certify to the city council. By the terms of the contract, the commissioner was made the arbitrator, and he and the engineer, the judges of the material and character of the work, and as both parties were bound by their

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judgment, which was to be manifest to appellant in the form of a certificate, the contention is that something further remained to be done than the payment of the money. It may be said in this connection, that appellant disputes the right of appellee to recover even if he had declared specially, for the reason that it went on with the work after being notified that the asphaltum furnished was not up to the standard required by the contract, and that it would not be accepted.

Where parties to a contract agree upon a third party as judge of the work and material furnished, and as an arbitrator to settle all disputes between them as to the work and material, and that payments shall be made only upon his certificate, they are bound by his decision. Although the work may have been entirely completed, the party doing it could not recover so long as there was an undecided dispute over the character of the work or material, and in the absence of a certificate from the arbitrator. An exception to that rule is made, however, in a case where the work and material fulfill the requirements of the contract and the dispute is merely captious, and the refusal of the arbitrator to certify is fraudulent and unreasonable. *Fowler v. Denham*, 83 Ill. 130; *Michaelis v. Wolf et al.*, 136 Ill. 68; *Arnold et al. v. Bournique*, 144 Ill. 132.

It would render this opinion too lengthy to review the evidence in the record which leads us to the conclusion that the conduct of those officers who were selected to pass upon the work and make certificates was unreasonable and unfair. We content ourselves with saying that it was such as to bring appellee's case within the exception recognized by the above cited authorities. We are clearly of the opinion that if appellee furnished the character of work and material required by the contract it could recover under the common counts.

The evidence tended to show that the work and material were up to the requirements of the contract, and that the paving done under it by appellee was superior to that done on other streets in the city by a rival company using the best quality of Pitch Lake asphaltum. Whether appellee did an

honest job and fulfilled the requirements of the contract as to the work and material was fairly presented to the jury and there is nothing in the evidence that would justify us in disturbing their finding.

The contention of appellant, that, as the contract provides for payment out of a special assessment fund to be collected by installment from owners of lots fronting Perry street, no judgment could be rendered until after the collection of the last installment, is unimportant, in view of the fact that at the time of trial there was to the credit of the improvement of Perry street made by appellee in the hands of the city treasurer \$56,806.91, a sum in excess of the judgment. The judgment entered by the court provided, also, that the damages and cost recovered should be paid only out of money in the hands of the treasurer belonging to the fund and out of such money as might thereafter come into his hands belonging to such fund. The action of the court in rendering such a judgment is criticised, and his power to do so questioned, but we think his jurisdiction and authority to do so clear.

The verdict returned by the jury fixed the damages at \$55,194.18. They evidently allowed interest, and we think rightfully. The court rendered judgment two months and seven days after the verdict was returned, and under section three, chapter seventy-four, Hurd's Revision of the Statutes, allowed interest upon the amount of the verdict for that time at the rate of five per cent. He made a mistake in computation of \$21.33 however, and rendered judgment for \$55,729.13 instead of for \$55,707.80, the correct amount.

We make the correction here and affirm the judgment to amount of \$55,707.80.

The attention of the trial court was not called to this mistake, this appeal was not prosecuted by reason of it, nor has our attention been called to it by counsel for appellant. We do not think it just, therefore, that appellee should be charged with any of the costs of this court, and order that all the costs of this court be taxed against appellant. *Joseph Moore v. The People of the State of Illinois*, 108 Ill. 484.

Judgment affirmed to the extent of \$55,707.80.

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Jacob C. Wickler et al. v. The People, etc., for use of John Lorenz.

1. **CONSTABLES—*Liability of Sureties.***—The seizure of the goods of A, under color of process against B, is not a mere private trespass of the officer, but is official misconduct, constituting a breach of his official bond.

2. **PRACTICE—*Defects in Declaration—Time to Object.***—If a declaration in an action for the wrongful seizure of mortgaged property is defective in failing to state that the mortgagor was the owner of the property at the time of the execution of the mortgage, the defendant should call the attention of the court to it during the trial. Such a defect is cured by verdict.

3. **PREFERENCES—*Manner of Making.***—A debtor has a right to prefer one of his creditors to the exclusion of others, either by making payment or giving security, and may execute a chattel mortgage in order to make a preference.

4. **SAME—*Motives of Debtor Immaterial.***—The motive of an insolvent debtor in securing one creditor to the exclusion of others, can not be inquired into, providing the creditor has done nothing improper.

5. **DELIVERY—*Of Note and Mortgage—Presumption as to.***—If a chattel mortgage and note is found in the hands of the mortgagee, the presumption of law is that it was properly delivered to him, and strong proof is required to overcome such presumption.

Debt, on a constable's bond. Appeal from the Circuit Court of Woodford County; the Hon. NATHANIEL W. GREEN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

JAMES A. RIELY and THOMAS KENNEDY, attorneys for appellants.

A. M. CAVAN and W. L. ELLWOOD, attorneys for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit brought by appellee for the use of John Lorenz on the constable's bond of Jacob C. Wickler, one of appellants, charging that the said Wickler, as constable, by virtue of three executions against C. Schultz, levied on certain property of John Lorenz, claiming it as the property of

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Schultz, the execution running against the goods and chattels of said Schultz and no one else, and took possession of the said property under such writs, to wit: a lot of butcher's tools and outfit, consisting of counter, butcher's blocks, scales, paper cutters, hanging lamps, meat saws, cleavers, dried beef cutter, bladed meat rocker, meat cutter, kettle, sausage stuffer, ice box and fixtures, meat hooks, belts, pulleys and shafts, one bay mare, one single harness, one wagon, one cow.

The said Wickler and the other appellants, his securities, were made parties defendant. The bond was for \$3,000, dated April 10, 1893, and was in the usual statutory form.

The constable, Wickler, after demand upon him by Lorenz for the return of the said property, advertised and sold the most of it at constable's sale to different bidders for a small sum, not to exceed \$50.

The evidence showed, however, that the value of the property was in excess of the verdict found by the jury.

The case was tried by a jury, which returned a verdict in favor of appellee for \$3,000 debt and \$322.72 damages, and judgment was rendered against the appellants for \$3,000 debt and \$322.72 damages, debt to be satisfied by the payment of damages.

The pleas were *non est factum*, and three special traverses and pleas to the effect that the chattel mortgage under which Lorenz claimed was fraudulent, and made to hinder and delay creditors, and that no proper demand was made by Lorenz upon Wickler for the property, and that Wickler sold the property with the knowledge and acquiescence of Lorenz. Issue was joined on the pleas and a replication was filed answering that Lorenz was not present at the sale, consenting thereto.

The claim of Lorenz to the property consisted of a chattel mortgage from said Schultz to him, dated August 7, 1893, acknowledged before a justice of the peace in due form and recorded in the recorder's office of the county on the same day, all prior to the issuing of the execution, which mortgage covered the property levied upon and was given to

secure a promissory note from said Schultz to Lorenz, bearing even date with the said mortgage, and due two years after date, for the sum of \$320, with interest at the rate of seven per cent per annum from date, interest payable annually.

The mortgage contained a provision that the possession of the property should remain with the said Schultz until default in the payment of the note, with the usual proviso that the mortgagee might take possession of the property any time that he might feel insecure and unsafe.

It appears that Schultz and Lorenz were brothers-in-law, the latter living in Chicago, Cook county, Illinois, and the former in Minonk, Woodford county, same State, and that the note and mortgage were given for a pre-existing debt due from Schultz to Lorenz for borrowed money to buy his butcher's outfit; that this was not the entire amount of the debt due from Schultz to Lorenz.

The above mortgage was the basis of Lorenz' claim to the property in question.

Counsel for appellants make many points which he urges for reversal of the judgment.

We will only notice such as we deem of any importance.

The first point made is, that this action will not lie against the securities on the constable's bond in this kind of a case.

We think that they are liable on the bond, and while there is conflict of authority on this question, we think the weight is in favor of their liability.

This court held to that effect in *Horan v. The People*, 10 Ill. App. 21, and where an officer levies a writ issued against the property of "A" upon the property of "B" it is a breach of the bond. See also *Jones v. The People*, 19 Ill. App. 300; see also *Walsh v. The People*, 6 Ill. App. 204.

We know of no case in this State to the contrary, and we will adhere to our former ruling, believing it to be correct.

Another objection made, is that the declaration is defective in not stating that Schultz was the owner of the property at the time he executed the mortgage.

We think this point is not well taken. The proof showed that he was the owner of it, and the declaration was not demurred to, and neither was there any objection at the trial to the introduction of the evidence on that ground, nor motions in arrest of judgment, nor any objection made whatever. It is too late to make such objection in this court. If such an objection had been raised in the court below, the declaration could have been amended, even after the evidence was all in, and before verdict, and after verdict we think it is too late to make such an objection. *C., R. I. & P. Co. v. Clough*, 134 Ill. 586.

The next point counsel for appellants raises, is that the mortgage was given to secure a pre-existing debt, and therefore not valid as against creditors.

There is nothing in this point. A chattel mortgage given in this State, under our laws, is good and valid if *bona fide*, whether the debt was created at the time the mortgage was given, or before, if the forms of the statute have been complied with. *McConnell v. Scott*, 67 Ill. 274.

We never have understood that this principle has ever been questioned in this State.

A debtor in this State has a right to prefer his creditors, and to secure them, and to prefer one to the exclusion of another, and to execute a chattel mortgage in order to make a preference. See *Hesing v. McCloskey*, 37 Ill. 341; *Pin-grey on Law of Chattel Mortgages*, Sec. 593; *Jones on Chattel Mortgages*, Sec. 356.

The motive of an insolvent debtor in securing one creditor to the exclusion of another can not be inquired into provided the creditor has done nothing improper. *Thornton v. Davenport*, 1 Scam. 296; *Funk v. Staats*, 24 Ill. 632.

It is insisted on the part of the appellants that the motive on the part of Schultz in giving the mortgage was improper, and that he was doing so for the purpose of delaying his other creditors.

From the evidence, we see but little foundation for this charge. Schultz was indebted in only a small amount besides this claim, and the only motive, so far as we can see, in giving the mortgage, was a laudable one, to secure his

brother-in-law in a considerable sum of money, which the latter had been kind enough to loan him, and which was used in the purchase of the very property mortgaged, and much less can we see any improper motive on the part of Lorenz in desiring to have his debts secured.

We think the evidence is abundant, without reference to the introduction of evidence, or instructions to sustain the verdict of the jury, and the verdict should not be reversed for slight errors, if any, on the part of the court on the introduction of evidence complained of.

Another point is made, that the evidence does not establish a delivery of the note and mortgage in question from Schultz to Lorenz before the 15th day of August, 1893, the date when Wickler received the first execution.

We think the evidence is sufficiently clear on this point.

The mortgage was executed and recorded by Schultz according to an existing arrangement with Lorenz, and when recorded should be regarded as a sufficient delivery. It was for the benefit of Lorenz, and assent to it would be presumed.

The chattel mortgage and note was found in the hands of Lorenz, and the presumption of law is it was properly delivered to him, and it would require strong proof to overcome such presumption. *Tunison v. Chamblin*, 88 Ill. 378; *Warren v. The Town of Jacksonville*, 15 Ill. 241; *Carnes v. Platt*, 41 N. Y. S. Ct. 435.

If the deed was delivered to strangers who had no authority to receive it, the delivery will be good if ratified by the grantee, if there was no authority in the first instance. *Morrison v. Kelly*, 22 Ill. 626; *Ferguson v. Miles*, 3 Gilman, 358; and if delivered to a third person with the assent of grantee would be effectual. *Hinrichson v. Hodgen*, 67 Ill. 179.

A delivery to a third party for benefit of grantee is good and conclusive on grantor. *Crocker v. Lawenthal*, 83 Ill. 579.

The constable's notice of sale was not improper, for the evidence showed that entire title of the property was sold, and not the mere equity of redemption of Schultz, and that

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was sufficiently testified to by Wickler himself and other evidence.

The evidence is also clear that Lorenz claimed the property from the constable, as shown by J. C. Wickler, constable, in his notice to the plaintiffs in the execution, notifying them that the rights of property would be tried September 23, 1893.

It is attempted to screen the constable from liability for selling the property under the executions by trying to show that he was the mere agent of one Ryan, a bailee appointed by the landlord of Schultz, to make distraint of the goods in question, and that Ryan had taken the goods prior to the issuing of the execution and turned the property over to Wickler after the executions were issued.

But the record shows that the property was levied on under the execution, and advertised and sold thereunder, and not under any distress warrant, and it was not even pretended to be sold under a distress warrant. There is another point made that Lorenz stood by and saw the sale without objection, and by so doing assented to the sale.

Even if he had done so, it was well understood by Wickler, the constable, that Lorenz claimed the property, and that sale was being made against Lorenz's will.

Complaint is made of the giving of appellee's instructions and of refusing appellants' instructions. We think, under the evidence and facts in the case, there was no serious error on the part of the court in its actions or instructions. The court gave six of the appellants' instructions, and modified and gave another, out of his series of twenty offered, and refused the rest.

We have not time to go into a critical examination of all these instructions, but we think the jury was fairly instructed. As we think, without reference to the instructions, the verdict was correct on the evidence.

After careful examination of the evidence in the case, we are of the opinion substantial justice has been done, and that there have been no substantial grounds urged for a reversal of the judgment.

The judgment of the court below is therefore affirmed.

Chicago, P. & Q. R. R. Co. v. Rachel Thorson.

1. **ORDINARY CARE—At Railroad Crossings.**—A person has no right to blindly run into danger and then seek to recover damages for the resulting injury from another; and a person will not ordinarily be permitted to recover damages from a railroad company for injuries received at a crossing, where the view of the railroad tracks was unobstructed for a considerable distance and such person went in front of a train without looking, or listening, or ascertaining by any means, whether it was safe to go upon the crossing.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Reversed. Opinion filed December 9, 1896.

SAMUEL RICHOLSON, attorney for appellant; O. F. PRICE, of counsel.

HENRY W. JOHNSON and TRAINOR & BROWNE, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by appellee against appellant to recover damages for personal injuries sustained by her, while attempting to cross appellant's railroad tracks at their intersections with Courtney street, in South Ottawa, in LaSalle county, on January 17, 1894.

On the first trial of the cause the jury disagreed, but upon the second trial appellee obtained a verdict for \$5,000, and a motion for new trial being overruled there was judgment on the verdict.

The declaration originally contained five counts, but plaintiff dismissed as to the third and fourth counts, leaving only the first, second and fifth.

The first count alleges that while the plaintiff, with all due care and diligence, was walking across said railroad, the defendant, by its servants, so carelessly and improperly

drove and managed a certain locomotive engine and train, that it ran upon and struck the plaintiff, causing her injury, etc.

The second count charges that plaintiff, with all due care, was walking across the railroad, and defendant's servants neglected "to keep a bell of at least thirty pounds weight to be rung and kept ringing, or a steam whistle to be blown and kept blowing for the distance of eighty rods, until the crossing was reached by said locomotive engine and train of cars, contrary to the form of the statute," etc., and alleges that by reason of such default and neglect, the plaintiff was then and there struck and injured, etc.

The fifth count sets up an ordinance of the city of Ottawa limiting the speed of locomotives attached to passenger cars to ten miles per hour, and limiting the rate of speed of locomotives attached to any freight car to six miles per hour, and alleges that the locomotive which struck the plaintiff, with the freight cars attached thereto, was running at a greater rate of speed than six miles per hour, whereby the plaintiff was struck and injured, while she was in the exercise of due care and caution for her own safety, etc. To all of these counts the defendant pleaded not guilty.

The facts of the case seem to be substantially as follows: Appellee was a domestic servant in the family of one Graves, who lived in the northeast part of the city of Ottawa. Mrs. Wilhelm, a sister of appellee, lived at the extreme southwest limit of South Ottawa, south of the Illinois river, and about 600 feet west of appellant's railroad on Courtney street. Appellee had been in the habit of visiting her sister once or twice a week for about a year before the accident happened, and, in doing so, necessarily crossed appellant's railroad on Courtney street, and thus became familiar with the crossing and its surroundings.

North Ottawa and South Ottawa are connected by a wagon and foot bridge across the Illinois river, and appellant's railroad also crosses the river upon a bridge some distance below the wagon bridge.

On the day of her injury, appellee rode with her employer,

Graves, as far as the north end of the wagon bridge and thence proceeded on foot to visit her sister, approaching the railroad crossing on Courtney street from the east. At the same time a way freight, carrying passengers, was approaching the same crossing from the north. There was quite a strong wind blowing at the time from the south, and toward the direction from which the train was coming. Appellee was either walking rapidly or running toward the crossing, which she reached at the same moment as the locomotive, and, stepping upon the track, the engine struck her and carried her upon the pilot across the street, where she rolled off the pilot upon the station platform, and in some way one of her feet was crushed and mangled in such a manner that amputation became necessary, whereby she lost two-thirds of the injured foot, causing a permanent and serious injury. She also received other hurts and bruises but not of a permanent nature.

At the close of plaintiff's evidence, a motion was made by appellant to exclude the evidence and direct a verdict for the defendant, but the court overruled the motion and defendant excepted. At the close of all the evidence the motion was renewed, but was again overruled, and this action of the court is assigned as error.

Various other errors are assigned by appellant, but the principal point relied upon for a reversal is that the evidence shows appellee's injury was the result of her own negligence, and that she has failed to prove that she was in the exercise of ordinary care for her own safety at the time of the accident.

It is insisted by counsel for appellant that there was no issue before the jury as to whether or not the statutory signals were given and that it was therefore erroneous to submit that question to them by instructions. While the second count of the declaration may be open to some criticism as to its construction, there can be no reasonable doubt as to its meaning, and it can not be fairly understood otherwise than as charging that a bell of the weight required by the statute was not kept ringing upon the engine until the

crossing was reached, so as to comply with the statutory requirements. We think there was no error on the part of the court in submitting that issue to the jury.

Nor do we think there was any error in admitting in evidence the ordinance of the city of Ottawa, limiting the speed of trains within the corporate limits. It seems to have been found in a book of ordinances published by the authority of the city, and which are by the statute made competent evidence. Rev. Stat. Ill., Chap. 28, Sec. 66.

There is a conflict in the evidence upon the question as to whether the bell was rung or not, as the engine approached the crossing—that on the part of appellee being entirely of a negative character, while witnesses for appellant, particularly the engineer and fireman, swear positively to the affirmative fact that the bell was an automatic ringer; that it was set in motion before the train left North Ottawa, and continued ringing until after the engine stopped subsequent to appellee's injury. The conductor and brakeman corroborate the engineer and fireman upon the point that the bell was ringing when they left Ottawa, but whether it was kept ringing until the crossing at Courtney street was reached they can not say. Mrs. Knash swears she heard the bell as the engine was approaching the crossing. Mr. Bute, a passenger, testifies to hearing the bell ringing before the train started across the bridge from North Ottawa. We think a clear preponderance of the evidence shows that the whistle was sounded about the time the train emerged from the bridge, which was something like 600 feet north of the crossing. We can not say, however, that a preponderance of the evidence shows that the bell was not rung and kept ringing, as required by the statute. But were this the only question in the case, we would not feel disposed to interfere with the finding of the jury, as they have unquestionably better opportunities of judging as to the credibility of the witnesses than we have, and due respect should be paid to their judgment in that regard.

As to the speed of the train, we think the evidence shows that it was going at a rate exceeding six miles per hour,

which, it being an engine attached to freight cars, was beyond the limit fixed by the ordinance. The evidence does not show, however, that it was going at a high and dangerous rate of speed, none of the witnesses swearing that it was going faster than ten or twelve miles per hour. It is not like the case of C., C., C. & St. L. Ry. Co. v. Baddely, Adm'r, 150 Ill. 328, cited by counsel for appellee, where the evidence showed that the train was going at the rate of fifty miles an hour, which was a high and dangerous rate of speed within the corporate limits of a populous town or city, regardless of any ordinance limiting the rate of speed. In the case at bar, we think a fair average of the evidence does not show that the train was moving at a greater rate of speed than about eight or nine miles per hour, which, aside from the ordinance, can not be regarded as a high or dangerous rate of speed, taking into consideration the location and surrounding circumstances at the time of the injury to the appellee.

It is insisted by counsel for appellant that inasmuch as the train which did the damage carried passengers, it must be regarded as a passenger train, and had a right under the ordinance to run at the rate of ten miles per hour, but we think that notwithstanding the fact that the train carried passengers it was still a freight train within the meaning of the ordinance, which by its terms prohibited any locomotive engine attached to freight cars from running faster than six miles per hour within the corporate limits of the city.

As a question of fact, therefore, we think the evidence shows that the train was running at a greater rate of speed than was permitted by the ordinance. But the question remains, whether or not appellee was in the exercise of ordinary care for her own safety at the time of the accident. If she was not, then, whatever may have been the negligence of appellant's servants in charge of the engine and train (short of such gross negligence as would amount to almost wilful and deliberate injury,) she can not recover. The burden of proving due care on her part was upon appellee. We think this allegation of the declaration is not supported

by the evidence, but on the contrary, it shows such an entire disregard for her own safety as to preclude any right of recovery. More than a dozen witnesses, having no better opportunity for observation than the appellee, testified that they saw or heard the train approaching. No reason is perceived why she should not have seen or heard the train as well as the others. It is argued by counsel for appellee, that she was young and inexperienced. But she was not a child of tender years; she was a young woman between sixteen and seventeen years old, apparently possessing ordinary intelligence and all her natural faculties. It is true the wind was blowing, and she was engaged in holding on her hat and trying to prevent the wind from disarranging her clothing, but her view of the track upon which the train was approaching was entirely unobstructed for a distance amply sufficient to enable her to see the oncoming train had she used the slightest care to discover it. She must have known that a railroad crossing is a dangerous place, as that is a matter of common knowledge with which we think she was properly chargeable. But according to her own statement, she hurriedly went upon the crossing in question, looking neither to the right nor the left, but straight ahead, simply paying no heed at all to anything except the fact that she wanted to get over the track as quickly as possible. Had she looked up but for one instant, she could not have failed to see the train, which was then close upon her, and the injury would have been avoided. She had no right to shut her eyes and blindly run into danger, and still claim to be in the exercise of due care for her own safety. While it is not proper to instruct juries as to what will constitute negligence in approaching railroad crossings of streets and highways, it nevertheless remains true, that no ordinarily prudent and careful person will attempt to cross a railroad track without looking, or listening, or ascertaining by some means whether it is safe to cross. Recoveries have been permitted in some cases where the injured party did not appear to have looked and listened for the approaching train, but they have generally been where some circumstances

of excuse took the case out of the operation of the general rule. In this case we see nothing in the evidence to prevent the appellee from discovering the train in ample time to avoid injury had she exercised the slightest care for her own safety, which we think she did not do. Several witnesses testify to statements alleged to have been made by appellee after her injury, tending to show that she saw the train approaching, but being in a hurry, thought she could beat it over the crossing, and in attempting to do so got caught and injured.

The witness Bute, who was a passenger on the train and helped to carry appellee to her sister's house after the accident, testifies that the sister, Mrs. Wilhelm, asked appellee what made her do it, and her reply was, "Because I was in a hurry, and it was all my fault."

Dr. Weiss, the surgeon who treated her after the injury, swears that appellee told him she saw the train coming and ran to beat it across. A number of other witnesses testify to similar statements, and while they are contradicted to some extent by appellee and her sister, we think the preponderance of the evidence shows that appellee did make such statements, and they would appear to be consistent with what seem to be the facts of the case. Without further extending the limits of this opinion, we feel constrained to hold that appellee was not in the exercise of ordinary care for her own safety, but was guilty of such negligence as precludes a right of recovery. Unfortunate as the injury is to her, we are of the opinion it was the result of her own want of care.

Our conclusion is, that the court erred in not sustaining appellant's motion to exclude the evidence and direct a verdict for appellant, and for that error the judgment must be reversed. Under this view of the case it is unnecessary to examine the other errors assigned. Judgment reversed.

FINDING OF FACTS TO BE MADE A PART OF THE JUDGMENT.

We find that appellee was injured through her own negligence and want of due care for her own safety, and not in consequence of any negligence on the part of appellant or its employes.

Amos L. Whiteman and Harmon M. Whiteman, Executors, etc., v. Electa M. McFarland.

1. **LIMITATIONS—*New Promise.***—In order to take a case out of the statute of limitations there must be a promise to pay the debt made within the statutory period, but such promise may be implied from an express and unqualified admission that the debt is due and unpaid, nothing being said or done at the time to rebut the presumption of a promise to pay.

Claim in Probate.—Appeal from the Circuit Court of Iroquois County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

KAY & KAY, FREE P. MORRIS, and F. L. HOOPER, attorneys for appellants.

C. H. PAYSON and NELLY B. KESSLER, attorneys for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a claim filed by the appellee, Electa M. McFarland, against the estate of her father, Amos Whiteman, deceased, in the County Court of Iroquois County, at its April term, 1895. It was a suit for cash claimed to have been loaned to deceased, in his lifetime, during the years 1863-4-5-6, aggregating the sum of \$180, at ten per cent interest.

There was a trial in the County Court at that term and judgments against the appellants, as executors of the estate of Amos O. Whiteman, deceased, for \$513.90. On appeal to the Circuit Court the case was again tried by a jury, March, 1896, resulting in a verdict of \$702 in favor of appellee, and judgment against the appellants for that sum, to be paid in due course of administration. It will appear from the date of the supposed lending of the money, a term of twenty-nine or thirty years had elapsed before the death of the said Whiteman, and before the filing of the claim against

his estate, and that the statute of limitations had many times run against the claim unless, as insisted by appellee, that the bar of the statute was avoided by promises made by deceased to pay her within the limits of the statute.

The death of Whiteman took place March 5, 1895.

The statute of limitations was relied upon in defense of the action, and while it is not claimed that the claim would not be taken out of the statute of limitations if the evidence showed subsequent promise within the statute, yet it is insisted that admitting all that was testified to by the different witnesses it does not show enough to legally revive the claim, and the witnesses were not entitled to belief, and that appellee's evidence was sufficiently contradicted by that of the appellant, and that therefore the verdict was contrary to the evidence. It is insisted that appellee failed to prove and establish her claim in the first instance, as well as to show its revival by a new promise.

The appellee was barred from being a witness in her own behalf under the statute and relied entirely for the establishment of her claim, and also its revival under the statute, to evidence tending to show the admissions of Whiteman in his lifetime, and his subsequent promises to pay the debt.

The witnesses called on the part of appellee to establish the claim, and the subsequent promise to pay, were as follows: Isaac Thomas, James C. Kane, Mrs. Emily Webster, L. C. Whiteman, James T. Watkins, Mrs. S. C. Whiteman, David Tebo, Arthur Whiteman and Ethel Whiteman.

The evidence failed to show the loan of the money except to the amount of sixty to one hundred dollars, except by the testimony of Ethel Whiteman, whose evidence is mainly relied upon to bring the case within the statute of limitations. She testified that she was at the deceased's residence at a birthday party on the 9th of August, 1895, and that appellee was there; that a conversation took place between them and the deceased concerning this debt, and that, as near as she could remember, they were on the porch and she was sitting on the steps with her sister, and they brought up something about this school money. (The appellee claimed

Whiteman v. McFarland.

to have earned this money teaching school, during the years in which it was claimed to have been loaned.)

The witness then testified that in that conversation the deceased, her grandfather, then said to the appellee, her aunt, "Well, I intend to pay you." Appellee said, "Well, it isn't much, but every little helps." Deceased said, "Well, \$180 with interest will be no small amount."

The witness testified on being recalled that she got to the deceased's home between nine and ten o'clock; she thinks it was later than nine and not later than ten o'clock. On cross-examination the witness stated that at the conversation spoken of the appellee said, "It isn't much," and that witness spoke up and said, "How much is it?" Deceased said, "One hundred and eighty dollars;" and appellee said, "Well, it don't amount to much," and deceased replied, "One hundred and eighty dollars and the interest will be no small amount."

The sister of appellee who heard the conversation is claimed by appellee to have been sick and unable to be present as a witness. Another one or more of appellee's witnesses testified that on another occasion deceased admitted that he was paying ten per cent, and that was the ruling rate of interest when he borrowed it.

It is insisted that this does not amount to such a promise as would save the running of the statute of limitations, but we think if it was uncontradicted it would be sufficient to authorize a jury to find there was such a promise.

It is laid down in several cases decided in the Supreme Court that in order to take the case out of the statute of limitations there must be a promise to pay the debt, but such promise may be implied from an express and unqualified admission that the debt is due and unpaid, nothing being said or done at the time to rebut the presumption of a promise to pay. It need not be an express promise. "Any language of the debtor to the creditor clearly admitting the debt to be due and unpaid, and showing an intention to pay it, will be considered an implied promise to pay and will take the case out of the statute." *Wooters v. King*, Adm'r,

54 Ill. 343; Ayers v. Richards, 12 Ill. 146; Keener v. Crull, 19 Ill. 189; Carroll et al. v. Forsyth, 69 Ill. 127; and many other cases might be cited.

According to the evidence for appellee, deceased admitted to Emily Webster that he had borrowed \$60, which she had earned teaching school. This was in 1864. And deceased admitted to L. C. Whiteman, brother of appellee, that he owed appellee some money, and he intended to pay her; that was about four years before his death. The same witness also saw his father get money from appellee twice, the first time \$40, in 1864, the next time in the spring of 1866, and he said he would pay her interest on the money. Mrs. S. C. Whiteman testified that deceased, in 1869, told her in the presence of appellee that he got appellee's school money, and that he intended to pay her every cent with ten per cent interest every year, and that he told her the same in the presence of appellee in 1883 and 1884.

Deceased said, in 1883, to Mrs. S. C. Whiteman, the reason he did not pay appellee more promptly was that she would wait and others would not, and that when he got the money that it was rating at ten per cent interest and that she should have ten per cent interest.

There is other evidence on appellee's behalf tending to establish the original debt and promise from time to time to pay it at ten per cent interest.

In rebuttal of this evidence appellant introduced evidence tending to show that deceased was able to pay this debt during his lifetime, if he had seen proper, and that he was a prompt man to pay his debts; and there was also evidence tending to impeach some of appellee's witnesses, showing that they had made contradictory statements out of court against what they had made in court as witnesses; and that one of the witnesses was prejudiced against deceased, and by other witnesses who were present at the birthday party testified to by Ethel Whiteman, tending to impeach her testimony by swearing to circumstances tending to show that deceased could not have been present on the porch and held the conversation which she testified to. But this last

testimony was not conclusive to show that the conversation could not have taken place as she testified.

All the evidence and rebutting evidence was before the jury, and it was its peculiar province to decide as to the sufficiency of the evidence.

We do not feel that the evidence was not sufficient to justify the jury in its verdict.

We do not think that the objections urged to the third, fourth, fifth and sixth instructions given for appellee can be sustained. In answer to the objection that there was not sufficient evidence on which to base those instructions, we will say that we think there was abundant evidence to submit to the jury on the questions involved both as to the amount of the debt originally and the subsequent promise.

There are other objections of lesser importance that have been urged by the appellant against the admission of evidence by the Circuit Court, which we do not think of sufficient importance to require an examination in detail, but we will say in general that while there might have been some slight error on the part of the court in such admission, such error, if any, could not have injuriously affected the verdict of the jury to the prejudice of the appellant.

There is only one question in this case that this court has any doubt about, and that is in regard to the sufficiency of the evidence showing the admissions of deceased to sustain the verdict as to the entire amount of interest allowed. The admission was, in substance, that deceased owed the \$180, with interest, but the rate of interest was not stated. But as there was evidence of other witnesses tending to show the original amount agreed to be paid was ten per cent, the jury had a right to refer such admissions to the original promise and agreement, and to hold deceased's admission to Ethel Whiteman sufficient to sustain the claim of ten per cent, and there was no error on the part of the jury in returning a verdict for that amount.

Seeing no error in the record, the judgment of the court below is affirmed.

68 300'
81 500

Rockford Gas Light & Coke Company v. Tabitha K. Ernst.

1. **GAS COMPANIES—Degree of Care Required of.**—A gas company deals with a dangerous agent for profit, and should exercise care proportioned to the dangers from which it is its duty to protect the persons and property of others.

2. **SAME—Liability of, for Damage done by Escaping Gas.**—A gas company is liable without notice, for all damages caused by gas escaping from its pipes, where leaks occur through the fault of the company; if they occur through the fault of another, liability attaches as soon as the company has had notice and time to repair.

3. **STREETS—Interest of Owner of Abutting Property in Trees.**—While a property owner has no claim to, or control over, trees growing in a street in front of his premises as against the municipality, yet as against third persons negligently injuring or destroying them he may recover.

4. **EVIDENCE—As to the Cause of an Injury—Similar Cases.**—Where one of the questions in controversy in a case is, whether gas permeating the soil would have the effect to poison and kill the roots of trees, it is proper to admit evidence tending to show that trees other than the ones alleged to be injured, were destroyed or damaged by gas escaping from the same pipe as that said to have caused the injury complained of.

Trespass on the Case, for injuries done by escaping gas. Appeal from the Circuit Court of Winnebago County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

E. P. and ROBERT LATHROP, attorneys for appellant.

R. K. WELSH, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted from a judgment for \$375 recovered by appellee in an action on the case for injury to shade and ornamental trees growing upon her residence lot, and upon the street fronting her lot, and for injury to her household goods, caused by the escape of gas from a break in the street main of appellant passing along appellee's property.

The evidence in the record shows that in a gas main owned and controlled by appellant lying along the street in front of appellee's property there was a large leak from which gas escaped and permeated the soil in which her shade trees were growing and through it reached the cellar and house of appellee. Appellee contended that the effect of the gas permeating the soil about the roots of the trees was to poison and destroy them. This was denied by appellant, and it was insisted that the trees were injured and destroyed by drouth and worms. While the evidence upon that point was conflicting, we think the preponderance shows that trees and shrubbery may be injured and destroyed by the action of coal gas upon their roots, and that in this case such result was produced upon appellee's trees by gas escaping from appellant's street main.

Appellant insists that the charge of negligence was not supported by the evidence, but that it was made to appear that the gas main was constructed of good material and in approved style; that a thorough inspection at the place in question was made a short time before the time of the alleged injury without discovering any leakage, and that the break was repaired within a reasonable time after appellant learned of it.

In the operation of its business a gas company is bound to exercise such care and diligence as to avoid injury to the health and property of others by the escape of gas. For commercial profit it deals with a dangerous agent, and the degree of care devolving upon it should be proportional to the dangers which it is its duty to avoid. *Shearman and Redfield on Negligence*, 3d edition, Sec. 336; *Emerson v. Lowell Gas Light Co.*, 3d Allen, 410.

If injury is done to adjoining property by reason of defective material used in pipes employed to convey the gas along the streets of a city, because of the imperfect manner in which the pipes are laid, or because of failure to repair breaks, whether caused by its own fault or that of another, the injured property owner has a right of action to recover for all damage sustained by him. In case of a break, if it

occurs through its own fault, the company is liable without notice. If it occurs through the fault of another, liability attaches as soon as the company has had notice and time to repair. If a reasonable inspection of the mains and pipes of a system would have discovered a leak, and such was not made, the company would be liable. If the damage occurs from a break which has existed for several days, and which could have been discovered by proper inspection, that is, of itself, evidence of negligence.

In this case the break was caused by the action of the frost in contracting the pipe. It could have been avoided by planting the pipe deeper in the ground.

The leakage of the gas began about the first of January and continued up to the fifth of February following, without being repaired. The company was guilty of negligence.

We do not agree with counsel for appellant, that appellee could not recover damages for the destruction of the two elm trees, planted by her nineteen years before, in the street immediately in front of her premises. While it is true she could have no property in, or control of, the trees as against the municipality, yet as against third persons negligently injuring or destroying them, she may recover.

It was not error to admit evidence tending to show that trees upon the other side of the street were destroyed or injured by escaping gas. That escaping gas, permeating the soil, would have the effect to poison and kill the roots of trees, was a disputed question material to the issue, and any evidence tending to establish or negative appellee's contention, was proper.

We see no error of the trial court, either in refusing instructions asked by appellant, or in giving instructions for appellee. Affirmed.

James K. Eagle v. Henry H. Troup et al.

1. APPELLATE COURT PRACTICE—*Consideration of Alleged Errors.*—Whether instructions given and refused were strictly accurate, in all respects, as applied to the facts of a case, need not be considered in a

Eagle v. Troup.

court of appeal if it appears from the evidence and the verdict, that the giving and refusing of them did no harm to the appellant.

2. *CONTRACTS—A Contract Construed.*—A person entered into a contract not to sell lumber in a particular town, or to interfere in any way with the lumber business in such town. *Held*, that sales made in such town, of lumber to be used there, but to be delivered to purchasers in other places, were violations of the contract.

Assumpsit, on a special contract. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

PADDOCK & COOPER, attorneys for appellant.

T. P. BONFIELD, W. R. HUNTER and H. K. WHEELER,
attorneys for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit in *assumpsit* by appellees, under the firm name of H. H. Troup & Co., against appellant, to recover damages for the violation of a good-will contract between them, given in consideration of a sale of appellant's lumber yard in Kankakee, to appellees, dated March 5, 1891.

The contract sued on provides that appellant would not "enter into the lumber business in any way, shape or form, nor sell lumber or building material on commission or for friendship, or in any way interfere with the lumber business in Kankakee (and other places named), as long as appellees remained in the lumber business in Kankakee, Illinois," and appellant agreed that he would pay to appellees "\$100 for every offense committed by interfering in any way with the lumber business in the town, as stated above."

The case was tried by a jury, and there was a verdict in appellee's favor of \$1,290, and judgment was rendered thereon by the court in favor of appellees.

The appellant objects to the giving of appellees' instruction No. 1, as follows: "You have no right to charge the sum of \$100 for each violation, unless you find from the evidence that the said amount was fixed by the parties as a

penalty to secure the performance of the contract;" and it is objected that the court erred in refusing instructions Nos. 16 and 17, offered by appellant, also in relation to the penalty; and in refusing appellant's refused instruction No. 13, in regard to the burden of proof.

Whether the instructions were strictly accurate in all respects, as applied to the facts of the case, we need not consider, as, under the evidence and verdict of the jury, the giving and refusing of them worked no harm to the appellant. It is insisted that the \$100 named in the contract for violation thereof should be regarded as a penalty, and not as liquidated damages.

Whether this is so or not, the jury must have held it as a penalty, and not as liquidated damages; otherwise the verdict would have been six to ten thousand dollars, instead of \$1,290.

It seems from the evidence that the verdict is largely within the bounds of the actual damages even, and the evidence would have justified a much larger amount for actual damages.

The evidence tends strongly to show that appellant never intended to abide by the contract, and deliberately and willfully violated it.

The device of selling to customers in Kankakee, and delivering in Chicago and other places, can not avail appellant.

Such sales interfered with appellee's business the same as in Kankakee.

The technical objection as to the introduction of evidence, contents of books, telegrams, etc., if error at all, is not reversible error.

Seeing no serious error in the record, the judgment of the court below is affirmed.

68	305
168	330
68	305
175	349

Fidelia L. Hewes and J. C. Doescher v. Village of Crete.

1. **REAL ESTATE—*Binding Effect of Plats.***—A village was surveyed and platted and the plat duly acknowledged and filed for record. *Held*, that a mistake in the original survey could not be corrected by a resurvey, and that the public as well as private parties who had purchased by the recorded plat must be governed by it.

2. **STREETS—*Abandonment of.***—Where land was platted as part of the streets of a village, but was afterward fenced and occupied for twenty-two years before the organization of the village, and was held for thirteen years after such organization, any right of the village to such land was held to have been abandoned.

3. **DEDICATION—*Not Binding Until Accepted.***—An acceptance of land dedicated for a street must be held to have been made in view of the conditions as they existed at the time of the acceptance, and a piece of land which was conveyed and fenced after the dedication, but previous to the acceptance, will be held to have been withdrawn from such dedication.

Agreed Case, submitting for decision the right of a village to use certain land as a street. Appeal from the Circuit Court of Will County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Reversed with directions. Opinion filed December 9, 1896.

HILL, HAVEN & HILL, attorneys for appellants.

C. W. BROWN, attorney for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an agreed case, submitting to the determination of the Circuit Court the following questions, viz. :

1. As to whether or not certain fences of appellant, extending from the north line of North street, on or near the west line of Benton street, in front of properties owned by appellants, in the village of Crete, were upon the true west line of Benton street.

2. If such fences were not on the true west line of Benton street, in front of the properties, then how far to the

east or west of where they then stood, said true west line was or should be.

3. If said fences should be found not to be upon the true west line of Benton street, in front of said properties, then whether or not, as against the village of Crete, the owners of said properties were or were not entitled to have and maintain said fences as they then stood. And it was stipulated that if said fences were not on the true west line of Benton street, and the owners were not entitled to maintain them where they then stood, the costs should be taxed against appellants, and the court should have the power to order the removal of the fences and enforce its decree as in other cases. And it was further stipulated that if said fences were on the true line, or if the owners were entitled to maintain them where then located, the costs should be taxed against appellee. Either party was to have the right of appeal to the Appellate or Supreme Court.

The court below found against appellants, that the fences were not upon the true west line of Benton street in front of the properties of appellants, but stood east of such west line some twelve or more feet, and ordered appellants to remove them within sixty days, and in default thereof the officers of the village of Crete were authorized to make such removal, and the costs of the proceeding were ordered to be taxed against appellants. The appellants excepted to this order or decree of court, and prosecute this appeal.

The village of Crete was surveyed and platted by Jedediah Woolley, county surveyor of Will county, October 5, 1848, for Willard Wood, who duly acknowledged the plat May 12, 1849, on which date it was filed for record. The village of Crete was not incorporated until the year 1880.

We think the rights of the parties must be ascertained by reference to the Woolley plat which shows the east line of Benton street to be located upon the section line. Even if in surveying Woolley made an error, we think it can not now be corrected by a resurvey, but the public, as well as private parties who have purchased by the recorded plat, must be governed by it. We are of the opinion further, that inas-

much as the fences in question were erected many years before the village of Crete came into being, and have been maintained where they are now located for some thirty-five years or more, the public must be held to have lost the strip in controversy by abandonment, even if it ever had it. In fact this strip was never accepted by the public authorities. The acceptance of the dedication must be held to have been made, if at all, in view of the fences as they existed at the time, and as the strip in controversy, by conveyances and fencing, was withdrawn from the dedication offered by the plat before there was any acceptance, the public acquired no rights therein.

The decree is reversed, with directions to the Circuit Court to enter a decree finding for appellants, and that their fences are on the true west line of Benton street, and that they have a right to maintain them where they are now located, and the costs will be taxed against appellee in accordance with the agreement. Reversed with directions.

Chicago & N. W. Ry. Co. v. Patrick Delaney.

68	307
100	681

1. **ORDINARY CARE**—*To be Judged by the Circumstances of Each Case.*—Negligence and ordinary care are relative quantities. Where the danger is very great, ordinary care requires closer watchfulness than it does in a case where the danger is only slight. A jury has a right to consider the extent of the danger to a person who was injured, and to determine what ordinary care required of the person charged with negligence.

2. **FELLOW-SERVANTS**—*Who are, a Question of Fact for the Jury.*—Whether a person suing for damages for personal injuries was hurt through the negligence of a fellow-servant, is a question of fact for the jury.

3. **SAME**—*When the Doctrine Does Not Apply.*—It is the duty of a railroad company to furnish to its employes proper appliances and a safe road bed, and it can not justify a failure to do so by showing negligence on the part of a fellow-servant of one who has been injured.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of LaSalle County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed in part. Opinion filed December 9, 1896.

WM. BARGE, attorney for appellant.

JAMES W. DUNCAN, attorney for appellee; LINCOLN & STEAD and DUNCAN & HASKINS, of counsel.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit by appellee against appellant for damages received by being injured so as to lose a leg while he was acting as foreman of a switching crew at Spring Valley, Illinois. The main charge of negligence was that cars filled with coal were switched in on the side track at appellant's yards, and in so doing, from about two to four o'clock p. m., November 14, 1893, the draw-bar was broken off one of the cars and laid upon the track, when, about nine o'clock at night, appellee, in switching the cars on the main track, while riding on the foot-board of the pilot, was injured by the foot-board being turned under the pilot and appellee's leg injured so that he was compelled to have it amputated.

The verdict in the case was for \$12,500, and the point having been raised in this court by the appellant that the damages were excessive, and this court holding that such was the case, required a remittitur by appellee of \$6,500, and on the 30th day of June, 1896, appellee, by his attorney, came into court and filed a remittitur in writing and offered to remit the sum required from the judgment.

Having done this, the question of excess of damages is eliminated from the case, as this court is of the opinion that if appellee is entitled to recover at all, the sum of \$6,000 would not be excessive. We will, then, proceed to the consideration of the case.

The declaration consists of two counts; the first alleges that the defendant was engaged in operating a railroad consisting of tracks, and particularly track No. 3, leading into and connecting with coal shaft No. 1 in Spring Valley; that appellant carelessly permitted track No. 3 to be obstructed by a large and weighty iron object known as a draw-bar, of which obstruction the plaintiff had no knowledge, and while he was in the employment of the defendant as night switch-

man, and in the performance of his duties, and standing upon the foot-board of the pilot of the engine, and proceeding along track No. 3 in the exercise of all due care and caution, said foot-board came in contact with the said draw-bar and the left foot of the plaintiff was caught and wounded and shortly thereafter amputated.

The second count charges negligence upon the part of the appellant in placing upon the said locomotive and pilot a foot-board that extended too close to the rails to be reasonably safe, and that that was the cause of the injury.

Appellant filed a plea of the general issue.

The yards at Spring Valley are known as Nos. 1 and 2, and in this case are designated as Shaft No. 1 and Shaft No. 2. Several tracks are in yard No. 1; among them Nos. 1, 2, 3 and 4. The evidence tends to show that both these yards were clean of all scraps of iron or other obstruction on the 14th of November, 1893, it being the evening of that day when the plaintiff was hurt. Track No. 3 in yard No. 1 was cleaned between eleven and twelve o'clock in the forenoon of that day. Track No. 3 was again inspected by the foreman in the afternoon, but whether before or after the draw-bar in question fell upon the track does not appear.

The sun set at 4:40 o'clock on that day, and it was dark at 6 o'clock.

George B. Draper was the yard master or switchman and employed appellee and the day and night crews.

The evidence tends further to show that from about two to four o'clock in the afternoon of that day, that car No. 8366, loaded with lump coal, was taken from track No. 1 and put upon track No. 3 about eleven o'clock in the forenoon of that date. In doing so, the evidence tends to show, the draw-bar of the said last mentioned car was broken off and left deposited upon said track No. 3. It was a piece of iron about eighteen inches long, ten inches wide and six or eight inches thick.

About 8:30 o'clock in the evening of that date the plaintiff and his crew proceeded along track No. 3 with engine No. 282 to remove some cars from it and put them in a

train they were then forming. Appellee and two of his men were standing on the foot-board when the pilot came in contact with a piece of draw-bar that was lying upon the track between the rails and his foot was caught and injured as above stated.

It is insisted that the verdict is against the weight of the evidence and that the court erred in refusing the defendant's 5th, 12th, 13th, 23d and 24th instructions and in modifying defendant's 8th and 9th instructions. Also that the court erred in refusing at the close of the testimony to exclude the evidence and to instruct the jury to find the defendant not guilty.

Negligence and reasonable care are relative quantities. Where the danger is very great, reasonable care requires closer watchfulness than it would in a case where the danger is only slight, and the circumstances of the injury in this case, and the cause of it, were all before the jury. The jury had a right to consider the extent of the danger to a person in the condition of appellee, riding on a foot-board constructed as this was, only six or eight inches elevated above the track, with reference to an iron, like the draw-bar in this case, lying upon the track, and to determine what reasonable care required of appellant to keep such an obstruction off the track. And we are unable to say that the jury erred in deciding that appellant failed to exercise such care. The evidence tended to show that this obstruction was lying on the track from two to four o'clock that day, also that it must have taken some violent bumping to have broken the draw-bar in the manner it was broken, and we think it would be reasonable to hold the appellant guilty of negligence in not discovering the fact that the draw-bar was broken at the time of the jar, or in not discovering that it was on the track between 2 o'clock and 8:30 P. M.

There was evidence tending to show that Draper was vice-principal of appellee and not fellow-servant; also to show that appellant failed to perform its duty to keep the track clear and to supply proper appliances for the safety of its employes.

The question of whether appellee was injured on account of negligence of a fellow-servant is a question of fact for the jury. Pullman Palace Car Co. v. William Laack, 143 Ill. 242; Sutherland v. North Pacific Railway Co., 43rd Fed. R. 646; U. S. Cir. Ct. for Minn.; Bessex v. C. & N. W. Ry. Co., 45 Wis. 477; Lewis v. St. L. & Q. M. R. R. Co., 59 Mo. 495.

It is therefore the duty of a railway company to furnish proper appliances and a safe road bed without reference to the question of fellow-servants, as will be seen by the above authorities and many others that might be quoted.

In regard to the refusal and giving of instructions, and modifying instructions, we have only to say that we think the jury was fully and amply instructed on the part of the appellant in the fifteen instructions given on its part out of the twenty-five asked; the four modified instructions, as given, were not a part of the fifteen and, as we think, not modified to the injury of appellant, but properly modified.

We also think that after the remittitur the damages in the case are not excessive.

The remittitur of \$6,500 offered by appellee from the judgment is accepted and allowed by this court, and the judgment of the court below affirmed for the sum of \$6,000.

It is further ordered that appellee pay the costs of this appeal.

MR. JUSTICE CRABTREE DISSENTING.

I am unable to agree with the majority of the court in the conclusions reached in this case. I think that the excessive verdict of \$12,500 shows that the jury must have been actuated by passion and prejudice, and the remittitur of \$6,500, entered upon the demand of this court, under penalty of reversal unless such remittitur were entered, does not, in my opinion, purge the verdict of its original vice. Even in a case where the plaintiff establishes a good cause of action, and shows that he is clearly entitled to recover, I think the damages should be assessed by a fair-minded jury, and not by this court.

But in this case, after a very careful examination of the evidence, I am of the opinion that appellee has failed to establish a right to recover under either count of his declaration.

The first count charges negligence in permitting track number three to be obstructed by the draw-bar which caused appellee's injury. But the evidence clearly shows that on the day of the injury the yards and track where it occurred were thoroughly cleaned of all obstructions by the section foreman and his gang of hands, the work being finished between eleven and twelve o'clock in the forenoon of that day. And there is evidence that the section foreman again went over the yard and inspected it in the afternoon of the same day.

So far as the cleaning of the yards and track, and the removing of obstructions therefrom is concerned, I think there was no want of reasonable or ordinary care on the part of the appellant or its employees. The evidence does not fix the precise time when Draper, the yard master, switched the cars onto track number three, but it could not have been, at furthest, more than an hour or two before sunset. It appears from the evidence that car No. 8866 from which the draw-bar, which caused appellee's injury, was broken, was carefully inspected by appellant's servants on the evening of November 13th, and again on the morning of November 14th, the day of the injury, and this inspection showed, that so far as the draw-bars were concerned, the car was in good order. It can not therefore be reasonably said, that as to this car there was any want of due care in the matter of inspection. Nevertheless, the next morning one of the draw-bars was found broken, and no doubt it was the same one which caused appellee's injury.

How it came to be broken off does not clearly appear. The yard master, Draper, testifies that when the cars, (including No. 8866) were set in on track number three, he did not discover any jamming; "that they hit a little hard, but nothing more than what often occurs. That it was very common." This testimony appears to be uncontra-

dicted, and, if true, nothing happened when the cars were set in, which, in the exercise of reasonable care, required an examination to see if anything was broken. I fail to find in the record any evidence which shows that the breaking of draw-bars, under like circumstances, was a matter of such frequent occurrence as to require an immediate inspection to ascertain whether any were broken or not. On the contrary, it seems to me it was an unusual and unlooked-for occurrence—a mere accident, which, in the exercise of reasonable care, appellant was not bound to look out for or anticipate.

If the breaking of draw-bars from cars under such circumstances was a matter of frequent occurrence, then it would seem that the hazard of encountering such an obstacle was one of the risks ordinarily incident to the employment of appellee, and for an injury arising therefrom, appellant would not be liable. Under all the circumstances shown by the evidence, I think the appellant was not guilty of negligence in failing to have the yard and track in question cleaned and free from obstructions, nor in the inspection of the car from which the draw-bar was broken, nor in failing to discover the broken draw-bar upon the track. It was not then long enough before dark to charge appellant with constructive notice, and there is no proof of actual notice. But if it was the duty of any one, under the circumstances, and at the time of day or night, to discover the broken draw-bar, it was that of Draper, the yard master, acting as switchman, when he set the cars onto the side track, and if, in that respect, he was negligent, I think it was the negligence of a fellow-servant with appellee, engaged in the same line of employment. He may have been a superior servant, or vice-principal in some respects, but certainly not as to this particular act. I think that it does not necessarily follow, that because one employe occupies a superior position, even though it be to the extent of having power to hire and discharge, that therefore in no event can they be fellow-servants. A section foreman may have the power to employ, direct and discharge the members of his gang, but

if, while working with them, one is injured by his carelessness, the negligence might not be that of the employer, but that of a fellow-servant. For instance, if the foreman and one of his men were carrying a bar of railroad iron, and the foreman should carelessly drop it so that the man was injured, or if, in driving a spike, the foreman should carelessly strike one of the men with his hammer and thereby do him injury, I apprehend it would be the negligence of a fellow-servant and not that of the common master. So in the case at bar. While Draper employed and directed appellee in his work, yet they each acted as foreman of a switching crew, and each ran the risk of injury from the negligence of the other; their relations in that respect in my opinion made them fellow-servants within the rule. To demand greater care than seems to have been exercised in this case would require the railroad companies to constantly patrol their tracks, to see that there were no obstructions thereon, and every time a car was switched upon a siding, there must be a careful inspection and examination, to see that nothing had been broken and dropped upon the track. It seems to me this would be requiring such extraordinary care as to be unreasonable and burdensome in the extreme.

As to the charge of negligence in the second count of the declaration, concerning the alleged improper construction of the stub pilot and foot-board of the engine upon which appellee was riding at the time he was injured, I am of the opinion the evidence does not sustain the charge. On the contrary, they appear to have been properly constructed for the purpose for which they were designed. They were not intended to run over obstructions the size of the broken draw-bar which caused the injury, and its presence upon the track was a mere unusual and unlooked-for accident.

In that particular case, no doubt it would have been better had the foot board been higher, but in ordinary cases it was high enough to be reasonably safe.

But even if it be conceded that the foot-board was too low, yet the appellee had equal opportunity with the appellant of knowing the fact. He was no novice in the use of

such machinery, and he testifies to seeing the engine, equipped as it was at the time of his injury, as early as the latter part of October, 1893, when it was at the round house; and he says he was there, on one occasion, looking at it for ten or fifteen minutes. The evidence shows that for a number of nights before the injury, some eight or ten, he worked on this particular engine without complaint. If there were any defects in construction they were obvious and patent, and could be as well seen and observed by him as by any other servants of the company, and he must therefore be presumed to know of such defects if any existed, and to have been willing to assume the risks, in absence of any complaint on his part and a promise of repair or change on the part of appellant. The law is well settled that an employe can not recover for any injury suffered in the course of the business about which he is employed, from defective machinery, after he has knowledge of the defects and continues to work without promise or representations that the defect will be remedied. In such a case it will be presumed he voluntarily assumed the risk, and waived whatever obligations rested upon the employer to furnish complete and perfect appliances. I do not deem it necessary to cite authorities in support of this proposition. They are numerous in this State. This court has fully recognized the doctrine in other cases.

I think the court below erred in not sustaining the motion to direct a verdict for defendant, and in my opinion the judgment should be reversed.

68	315
96	140

Chicago, B. & Q. R. R. Co. v. E. B. Willard.

1. EVIDENCE—*Admission by Agent.*—In a suit for malicious prosecution, the statements of a detective employed by a railroad company, made at the time of a preliminary examination, on a warrant the issuance of which is complained of, are not admissible against the company to prove that the detective acted as a representative of the company, and within the scope of his authority, in causing the arrest of the plaintiff.

2. *SAME—As to Authority of Agent.*—In a suit against a railroad company for malicious prosecution, based on an arrest caused by an agent of the company, the defendant may show that the agent had no authority to make arrests or swear out warrants, unless especially instructed so to do, and that in the particular instance he acted without authority.

Action, for malicious prosecution. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 9, 1896.

SAMUEL RICHOLSON, attorney for appellant; O. F. PRICE, of counsel.

J. E. COLEMAN and TRAINOR, BROWNE & AYERS, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$2,000, rendered against appellant in a suit for malicious prosecution, in which appellee charged appellant with procuring his arrest and imprisonment on a false charge of larceny.

The facts which led up to the arrest of appellee were as follows:

A car load of potatoes, which had been shipped by H. S. Smith & Co., of Minneapolis, and which had been refused by the consignee, was upon the side track of appellant's railroad at La Salle. The freight was not paid, and appellant's station agent, acting under instructions from Smith & Co., offered the potatoes for sale. Appellee purchased them, agreeing to pay forty cents a bushel. He advanced \$50, and agreed when he had removed from the car enough potatoes to cover that amount, to make a further deposit. After he had removed potatoes amounting to about \$95, and had peddled them out to various parties, he left the State and did not return for several weeks. Franks, becoming alarmed, called upon C. H. Dawson, a detective in the employ of appellant, for assistance. About a month

afterward Dawson, ascertaining that appellee was at Peru, Illinois, swore out a writ for appellee and procured his arrest.

An examination was had before a magistrate, who held appellee to bail, and in default of bail to amount of \$200, committed him to the county jail to await the action of a grand jury. The entire expense of prosecution was borne by Smith & Co., and Franks testified that all action taken by him in the matter, was at the instance of Smith & Co., and not as the agent of appellant. Appellee was committed on the 27th of December, 1893, and remained in jail in Ottawa until January 13, 1894, when he was discharged because the grand jury failed to return a bill of indictment against him.

If a recovery can stand it must be upon the theory that the acts of Dawson were those of the railroad company. The company defended mainly upon the ground that it was not a participant in the criminal prosecution, and that it was instituted by Dawson without its sanction or knowledge.

It is argued here to some extent that there was probable cause for making the complaint and procuring appellee's arrest, but as the cause will be submitted to another jury we do not care to express our views upon that feature of the case.

It is clear that there could be no recovery against appellant unless the evidence showed either that the arrest and imprisonment of appellee were procured at its instance, or that Dawson in procuring his arrest acted within the line of his authority, or that being advised of the notion of Dawson it suffered him to proceed without objection.

There is no proof in the record that the warrant upon which appellee was arrested was procured at the instance of appellant or that appellant knew anything of the prosecution until long after appellee had been committed to jail.

Counsel for appellee realized the necessity of showing that what Dawson did was as a representative of appellant, and fell within the apparent scope of his authority. He sought to do so by the declarations of Dawson himself, made

before and at the time of the preliminary examination. The court at first held that he could not make the proof in that mode, but afterward, over the objection of appellant, allowed him to do so. That was error.

When appellant offered to show by the testimony of H. D. Judson, superintendent of appellant, what the limit of Dawson's authority was, that he had no authority to make arrests or swear out warrants unless specially instructed to do so, and that in the instance of appellee's arrest Dawson acted without instructions, the court refused to allow the proof. In this the court erred. Such testimony was very important, in view of the fact that the contention of appellant, through the entire trial, was that appellee's arrest and imprisonment was at the instance of Smith & Co., and that what was done by Franks and Dawson was as the agents of that firm and not as agents of appellant.

We see nothing wrong with instructions given for the plaintiff.

For the errors of the court in ruling upon the admission of testimony above indicated, the judgment will be reversed and the cause remanded for another trial.

Thomas Doyle et al. v. The People, etc., for use, etc.

1. **DAMAGES**—*When Amount of, Will be Ground for the Reversal of a Judgment.*—Where the damages awarded to a plaintiff are grossly excessive, and against the clear preponderance of the evidence, the judgment will be reversed on appeal.

Debt, on a constable's bond. Appeal from the Circuit Court of La Salle County: the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 9, 1896.

DUNCAN, HASKINS & PANNECK, attorneys for appellants.

C. S. CULLEN and REYNOLDS & PURKHISER, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was a suit brought in the name of the people, for the use of Maggie Gunning, against Thomas Doyle, Frank Reinke and John Martin. Doyle was a constable, and the other two defendants were sureties upon his official bond.

The action was upon the bond to recover the value of certain personal chattels which Mrs. Gunning claims were her property, but which were levied upon and sold by Doyle, as constable, under a writ of attachment against one John Stuckel, a son-in-law of the beneficial plaintiff.

There was a recovery below for \$250. Appellants bring the case here, and insist on a reversal, upon two grounds, viz.: First, that the evidence does not support a verdict that the property belonged to Maggie Gunning; second, that the damages are excessive.

As no legal principle is involved, no extended statement of the facts is necessary. No complaint is made of the rulings of the court in admitting or rejecting evidence, nor in giving or refusing instructions.

On the first ground urged by appellants, we would not be disposed to interfere with the judgment, especially as two juries have found the property in question to belong to Mrs. Gunning. But, under the evidence, we regard the damages as greatly excessive, and against the clear preponderance of the testimony. For that reason the judgment must be reversed and the cause remanded.

John Peck v. W. R. Hinds et al.

1. **MECHANIC'S LIENS**—*The Statute Must be Strictly Construed.*—The mechanic's lien act being in derogation of the common law, must be strictly construed, and no person can have a lien under it without showing a strict compliance with its provisions.

2. **SAME**—*Notice of Sub-contractor's Claim.*—The notice required by Sec. 80 of the mechanic's lien act must be in writing, and must be served personally; a notice sent by mail is not sufficient.

3. PRACTICE—*When Holdings of the Trial Court Will be Sustained.*—The holdings of a trial judge should be sustained if they can be justified from the record, and if an order dismissing a petition was correct, it will be affirmed on appeal, although the defects in the petition which justify the dismissal were not called to the attention of the trial court.

Mechanic's Lien Proceedings.—Appeal from the Circuit Court of Whiteside County; the Hon. JOHN D. CRABTREE, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

A. A. WOLFERSPERGER and H. C. WARD, attorneys for appellant.

C. L. SHELDON, attorney for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a petition by appellant to enforce a claim for mechanic's lien on a lot belonging to appellee Sarah A. Ross, for material furnished by him to F. R. Hinds, a contractor and builder who had built a house on appellee's lot under contract with her.

The balance claimed to be due appellant was \$221.

The appellant filed the required statement of his account with the clerk of the Circuit Court of Whiteside County December 14, 1894.

On hearing, the court below dismissed the petition.

From such order of the Circuit Court this appeal is taken.

The original contract to build the house between appellee and Hinds was for \$860, and afterward a bill of extras was added of \$66, making a total of \$926. There was paid in cash \$650 and appellant claims that there was a balance due of \$270, out of which he had a right to be paid.

The appellee insists that the contract was not completed and that the damages resulting to her by means of the non-completion of the contract, and orders accepted by her, drawn by Hinds, before notice of appellant's claim, and afterward paid, exceeded any balance due Hinds on the contract. The appellee answered, insisting that she had no notice that Hinds was paying for the material for the house until after

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the first two payments were made, \$450, and the only notice she had then of appellant's claim, was that Peck met Ross, husband of appellee, on one occasion and told him that Hinds was behind on account of the lumber which he, Peck, was furnishing for various buildings which Hinds had under construction, and E. J. Ross told Peck he was going to pay Hinds some money in a short time on his contract, and that if Peck so desired he would have Hinds come to his lumber office and pay the money there; and Peck said he wished he would do so; that on November 13, 1894, E. J. Ross, one of the appellees, went with Hinds to the office of Peck, appellant, and there paid Hinds, in the presence of the appellant, the sum of \$200, to apply on his contract, and that appellant on that occasion received from Hinds \$150, and allowed the latter to retain \$50, and appellees understood that appellant was satisfied with the said payment and that appellees received no further notice of any kind until after they had accepted certain additional orders drawn on them by Hinds, one for \$75, December 9, 1894, in favor of John Miller, for labor performed on the house and one dated December 12, 1894, for \$103.44, in favor of McLittle & Son, for plastering on the house.

The appellees E. J. and Sarah A. Ross denied that they owed Hinds anything, or that appellant was entitled to any lien, and retained a demurrer in the answer to the petition.

The petition shows that the appellant was a sub-contractor and based his right to a mechanic's lien under the mechanic's lien act relating to such contractors. Sec. 30, Ch. 82, R. S., requires a notice to be served on the defendants of the claim, and there is no allegation in the petition that the required notice was served, or that the contractor had made a sworn statement as provided for in Sec. 35 of the said act; and, in fact, Hinds never did make the required affidavit, and appellant should have served notice in writing within forty days from the time of the completion of the sub-contract in order to entitle him to a lien. The appellees insist that, as a matter of fact, they never received any notice until after they had accepted the orders for payment in full. That

service of such notice is required, see *Shaw v. Chicago Sash & Door Mfg. Co.*, 144 Ill. 531; *Ryerson & Son v. Smith*, 152 Ill. 645.

The proof in the case tends to show only that the notice required by Sec. 30 was served by putting the notice in a letter envelope and directed to appellees, and put in the mail for them. This was not a compliance with the act requiring notice. The mechanic's lien act being in derogation of the common law must be strictly construed, and the notice required by the statute must be in writing and served personally.

Service by mail is not sufficient to charge the owner. *Carney v. Tully et al.*, 74 Ill. 375.

No person can have a lien under the mechanic's lien law without showing a strict compliance with its provisions. *Belanzer et al. v. Hersey et al.*, 90 Ill. page 70.

The appellant, to avoid the defect in the petition of a want of allegation of notice under said Sec. 30 of the statute, insists that the appellees waived that by their answer in the following paragraph, to wit: "That they never had at any time, any notice, of any kind or character, that said Hinds was not paying for the lumber used in the construction of the said building until after the first two payments had been made to said Hinds on account of said contract." We do not think that such admission in the answer was sufficient to dispense with the allegation in the petition of the statutory notice, or the proof of the same, because when the answer is taken in full, it shows that upon the payment of the \$200 at Peck's lumber office, after the supposed notice, the appellees' answer shows that they understood from the conduct of Peck, appellant, that the payment to Hinds and the \$150 received by Peck, appellant, was satisfactory to the latter, and the answer further avers that appellees had no further notice but that Hinds had fully paid and satisfied "all claims of lumber and material appellant had furnished to Hinds for construction of the said dwelling house, until December 14, 1894, which was after the appellees had paid said Hinds the full amount of the contract for said building."

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So taking the answer as a whole it fails to admit the giving of the statutory notice.

The answer also retains a demurrer to the petition.

It is insisted by counsel for the appellant that the question of the sufficiency of the petition filed by appellant was not raised in the court below and therefore can not be raised in this court.

We are of the opinion, however, that the question was presented by the pleadings of the want of necessary allegations in the petition and that it was not necessary to call the court's especial attention to it, or the attention of the opposite counsel.

If the court's action in dismissing the petition on the face of the papers was correct, this court would sustain it, notwithstanding that defects were not particularly insisted upon in the court below.

The action of the trial judge should be sustained if it can be justified from the face of the papers.

But even admitting the want of allegation of the statutory notice in the petition was cured by the answer, we think that the evidence fails to show that the appellees owed Hinds anything after the acceptance of the two orders named, deducting the damages which appellees sustained on account of the failure of Hinds to perform the contract of building the house in a good, workmanlike manner, and in not completing it in the time required by the contract.

Appellees have the right to deduct such damages against the contract price, even as against the material-man.

The evidence as to whether appellees had notice, even verbally, of appellant's claim against Hinds for material furnished for the house before the last orders were accepted by appellees, and in regard to the damages claimed by them for failure on Hinds' part to build the house according to contract, and the consequent damages to appellee therefor, was conflicting, and without going into a critical examination of the evidence, we can say that we think that the evidence clearly sustains the contention of appellees, and that the court below was fully justified in decreeing the dis-

missal of appellant's petition. The decree of the court below is therefore affirmed.

Judge CRABTREE, having tried the case in the court below, took no part in the decision here.

68	824
106	1481

Illinois Central Railroad Company v. William Truesdell.

1. **RAILROADS—Liability for Injury Caused by Defective Approach to Crossings.**—A railroad company is liable for injuries sustained by parties while in the exercise of reasonable care, by reason of the defective condition of an approach to a railroad crossing, however distant from the railroad track and however disconnected from the dangers incident to the operation of trains, provided the defect is within the right of way.

2. **SAME—Approaches to Crossings.**—What constitutes the approaches to a railroad track must be determined from what is reasonable in each case and from what is actually used as such by the railroad company and acquiesced in by the public. They may extend to the limits of the right of way, or a few feet from the track may be sufficient.

3. **SAME—Liability for Condition of Right of Way at Intersection with Public Highway.**—A railroad company is not required to keep all of the traveled portion of a highway outside of its tracks, but within its right of way, safe and free from obstructions, but only such part thereof as may be included within the approaches to its tracks.

4. **INSTRUCTIONS—Should not Assume Facts in Dispute.**—An instruction should not assume the existence of facts which are in dispute.

5. **NEW TRIALS—On Account of Newly Discovered Evidence.**—A new trial should not be granted on account of newly discovered evidence unless it appears that such evidence is conclusive in its character as regards some material point involved in the case, and not merely cumulative.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Iroquois County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 9, 1896.

C. V. GWIN, FREE P. MORRIS and FRANK L. HOOPER, attorneys for appellant; JAMES FENTRESS, of counsel.

C. H. PAYSON and NELLY B. KESSLER, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was an action on the case to recover for injuries sustained by appellee in being thrown from a wagon while crossing over appellant's railroad and right of way at their intersection with a public wagon way.

The negligence charged was in allowing a stake some ten inches above the ground to remain upon the approach to the crossing over the railroad, against which appellee's wagon wheel ran, thereby throwing him out of his wagon.

There was a recovery for \$3,000. The action was based upon the following section of the statute :

Sec. 8. Hereafter, at all railroad crossings of highways and streets in this State, the several railroad corporations in this State shall construct and maintain said crossings and the approaches thereto within their respective rights of way, so that at all times they shall be safe as to persons and property.

The evidence in the record shows that the injury complained of occurred in the following manner :

On the evening of the first of October, 1894, while appellee, in company with his wife and a Mr. Ball, was riding in a wagon drawn by a spirited team, he was thrown from his wagon by reason of running against a post or stake standing about ten inches above the surface of the ground in the highway upon appellant's right of way. The highway was but little used and was in rather bad repair. The width of the right of way is 200 feet and that of the highway four rods.

The stake in question stands about fifty feet east of the railroad track, and about midway of the track and the east line of the right of way. There is a rise from the natural surface of the ground on the west side to the track of about four feet, and from nine to ten feet on the east side. The immediate approach from the ground to the top of the rail

is quite abrupt on either side. The evidence does not clearly show whether the stake was upon what could be properly considered the approach to the crossing, but was within the usually traveled part of the highway, and protruded from ground where it was slightly raised above the natural surface.

In one of the briefs filed by appellant it is very ingeniously argued that no right of action upon the above quoted section can be maintained against a railroad company to recover for injuries sustained by reason of the defective condition of the highway approach to the railroad crossing, unless it appear that the injury was occasioned by or in some way connected with the dangers incident to the operation of trains.

It is urged with great vigor that if it be conceded that appellee was injured by reason of a defective condition of the approach to the crossing, then as the evidence shows that as the defect consisted of a protruding stake some fifty feet distant from the railroad track, and the injury was not in any way connected with dangers incident to the operation of trains crossing the highway, there can be no recovery.

There is nothing in the act of which the above quoted section is a part which warrants an interpretation that the sole purpose of the section is limited to an exercise of the police power of the State to secure the safety of persons and property from the dangers resulting from the operation of trains over the highway crossing. The words appearing in the latter part of the section—"shall construct and maintain said crossings and approaches within their respective rights of way, so that at all times they shall be safe as to persons and property"—would seem to preclude any such interpretation. We are of the opinion that a railroad company is liable for all injuries sustained by parties, while in the exercise of reasonable care, by reason of the defective condition of an approach to a railroad crossing, however distant from the track, however disconnected from the dangers incident to the operation of trains, provided the defect is

within the right of way. In that view we think we are sustained by what is said in the opinion in the following cases: *City of Bloomington v. I. C. R. R. Co.*, 154 Ill. 539; *C. & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309.

It is contended that the stake against which appellee drove his wagon is not situated upon the approach.

In the trial of such cases what constitutes the approach may often become the serious question of dispute. We are not inclined to the view that the approach within the meaning of the statute includes all that portion of the usually traveled part of the highway extending from the outside limit of the right of way to the track. That it does not necessarily include the entire width of the highway is held in *City of Bloomington v. I. C. R. R. Co.*, *supra*. The length of the approach must be determined from what is reasonable in each case, and from what is actually used as such by the railroad company and acquiesced in by the public. It might extend to the limit of the right of way, or a few feet from the track might be sufficient.

In case of a track situated upon a dump many feet above the natural surface the approach would be necessarily longer than in case of a track situated upon or near the level of the natural surface. The jury, of course, must determine that question from the lights which the evidence furnishes.

We see no force in the contention that appellee was guilty of contributory negligence.

It is claimed that the damages are excessive. No evidence of a serious and permanent injury manifested themselves until a number of months after the injury. Immediately after being thrown from the wagon, appellee was able to walk, and started in pursuit of his runaway team. He walked a quarter of a mile, when he was met by his wife and Ball driving back to meet him. He drove to Onarga the next day, was examined by his physician, who detected a slight injury to his shoulder, to the calf of his right leg and hip. The physician directed him to use some liniment and advised rest for a short time. He evidently

did not consider himself much injured at the time, for within a few days he was about at his work, doing chores and driving about from place to place over the country. In the month of February following the injury in October, he passed an examination for membership and insurance in the Modern Woodmen of America, answering that he was in sound bodily health, and obtained a certificate to the same effect from the physician who examined him on the day after he received his injury. In the month of March following he was at one time engaged in hauling, lifting and moving heavy bridge material. In this kind of work he seems, from the evidence, to have worked as vigorously as other of the men who were engaged with him, and made no complaint of being lame or injured. Late in the spring or early in the summer his condition became quite serious, however. There was a general derangement of the system. He became lame, suffered from an affection of the sciatic nerve, it was thought by his physician, and was compelled to resort to the use of crutches. The evidence tends to show that his physical condition at the time of the trial was very bad, and if caused by the injury complained of, and the liability of appellant was established by the evidence, no court would feel warranted in setting aside the verdict solely upon the ground that the damages awarded were excessive.

We see nothing seriously wrong with the rulings of the court upon the admission of testimony.

The court gave to the jury in behalf of appellee the following instruction:

"1. You are instructed by the court that the question as to negligence in cases of this kind is a question purely of fact, to be determined by you from all the evidence in the case. It is for you to say, after a careful consideration of all the evidence in this case, whether or not the defendant suffered or permitted the post to be and remain where the evidence shows it did stand, and whether or not it was negligence for the defendant to permit the post in question to remain in the place it was. It is for you to say, after a

careful consideration of all the evidence in this case, whether or not the plaintiff in passing along and over said crossing used such care and caution as to his own safety as the known danger attending the passing of that point required. And if, from all the evidence, you find that the defendant was negligent in permitting said post to be and remain there, and further find that the plaintiff was not guilty of any negligence in attempting to pass it, and further find that the plaintiff was injured as alleged in the declaration, then in such case, upon this question of negligence, the law is with the plaintiff."

This instruction is vicious, because it made the railroad company liable regardless of whether the post was on an approach. It tells the jury to determine the negligence of the company from evidence as to whether the company permitted the post to remain where it was. If the post was not on the approach there could be no recovery for an injury occasioned by running onto it.

The second instruction given for appellee is as follows: "You are instructed by the court that if you find from all the evidence in this case that the plaintiff, knowing the dangerous character of the crossing in question, used all and every possible care and caution for his safety at the time in question, and that he received the injury complained of as alleged in the declaration, and without any fault or negligence on his part, then, upon the question of negligence in this case, the law is with the plaintiff, notwithstanding the fact that the dangerous condition of said crossing was known to the plaintiff."

The vice of this instruction is that it assumes that the character of the crossing in question was dangerous. The third instruction given for appellee was bad, because it told the jury that if they believed from the evidence that the railroad company permitted the post to remain near the center of the traveled portion of the highway within and where it crossed the right of way, so as to render it dangerous to persons wanting to pass over the approach, etc., it would be liable. From the instruction the jury would under-

stand that it was the duty of the railroad company to keep the traveled portion of the highway over the entire right of way safe and free from obstructions. As held by us, that would not be necessary unless the conditions were such as to require the approach to extend to the boundary limit of the right of way.

Appellant moved for a new trial upon the ground of newly discovered evidence, and in support thereof presented the affidavit of Free P. Morris, one of its attorneys in the case. The affidavit set up that after the trial had begun it was learned for the first time that appellee had in February, 1895, been examined as to his physical condition with a view to membership and insurance in the Modern Woodmen of America; that in his sworn application for membership, and in the examination subsequently had, appellee stated, at the time, that he was in sound bodily health and free from disease; that such statements were in writing, and in possession of the head physician of the organization at Vandalia, and that appellant did not know that such statements had been made until after the conclusion of the trial. Such evidence would be quite material, and, if heard, would doubtless affect the matter of damages. It is not conclusive, however. Before a court is warranted in setting aside a verdict upon the ground of newly discovered evidence alone, it must be conclusive in its character and not cumulative. We do not mean to be understood as holding that it should be conclusive as to right of recovery. If it was conclusive upon the subject of whether the injury was permanent in a case of this character, and where the damages awarded were so heavy that they could be sustained only upon the theory that the injury was permanent, then the newly discovered evidence would be sufficient. But the newly discovered evidence set up in the affidavit is not conclusive upon that question. Had it been shown upon the trial that such statements were made by appellee and supported by the report of the examining physician, still, if the other proof showed clearly that appellee was permanently injured in the accident at the highway crossing, the jury would be justified in finding the injury was permanent.

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In view of the fact that the evidence does not clearly show that the post in question was upon the approach to the crossing, we are of the opinion that the error of the court, in giving instructions as above indicated, are so serious as to require a reversal of the judgment and a remanding of the case for another trial. Reversed and remanded.

John C. Sloan v. C. H. Thornhill.

1. *CONTRACTS—Willingness to Perform, a Question of Fact.*—Whether a plaintiff who sues for the breach of a contract of sale was ready and willing to perform on his part, is a question of fact for the jury, and where a refusal to deliver the goods sold is proved, evidence of a tender is not essential.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Mercer County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

BASSETT & BASSETT, attorneys for appellant.

THOMASON & CUMMINS, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellee brought suit against appellant, before a justice of the peace, to recover damages for an alleged failure to deliver certain cattle which the former claims were sold to him by the latter. The cause was tried by a jury and appellee recovered a verdict. Appellant took the case to the Circuit Court by appeal, where it was again tried by a jury, resulting in a verdict for appellee for \$125. A motion for a new trial being overruled there was judgment on the verdict. Appellant brings the case here and seeks a reversal, on the grounds, mainly, that the verdict is against the evidence, and that the court erred in giving instructions. Ap-

appellee claims to have purchased from Sloan, appellant, eight cows, one bull and one crippled steer at two cents per pound, seven heifers at two and one-tenth cents per pound, and thirteen steers at three and one-tenth cents per pound. That the contract was made on Saturday afternoon, and appellee was to go to appellant's place the following Tuesday evening and assist in rounding up and weighing the cattle, and take them away Wednesday morning, the payment to be then made in cash.

Appellee went to Sloan's place on Tuesday evening and with the aid of appellant's son got the cattle into the lot, and remained until the next morning, when appellant informed appellee that the cattle belonged to his, appellant's, daughters, and that they were not willing to sell for the price appellee had agreed to pay for them, and informed appellee that he might talk to the daughters. Appellee then offered the daughters \$5 each for their consent to the sale, but they demanded \$100. Appellant refused to do anything more about it, claiming that he had only sold the cattle on condition that his daughters consented to the sale. After formal demand made, appellee brought suit, with the result already stated. As to whether the sale was absolute or conditional was purely a question of fact, which two juries have determined against appellant, and we think their verdicts were justified by the evidence.

It is objected that the evidence does not show that appellee was ready to comply with the contract on his part, but we think the point is not well taken. He appeared at the time and place agreed upon, apparently ready to take the cattle, but appellant absolutely refused to deliver them, without reference to the question of payment. When appellant refused to deliver the cattle, it would have been a useless formality for appellee to take out his money and offer to pay. This matter seems to have been an afterthought on the part of appellant, or his counsel, even his instruction No. 5 failing to put in this condition as one of the requisites to a right of recovery by appellee. Whether appellee was ready and willing to perform the contract on his part, was

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a question of fact for the jury, and under the circumstances slight evidence on this point was sufficient. We see no error in the rulings of the court as to the measure of damages, nor in its action upon the instructions, and the judgment will be affirmed.

American Silica Sand Company v. Frank McGarry.

1. *EVIDENCE—Improper Basis for Estimates.*—In a suit to collect the amount due for excavating done under a contract providing for payment by the yard, it is improper to admit evidence as to the number of days work done, the number of trips made per day, and the capacity of the scrapers used. Such evidence is entirely too unreliable to form a correct basis for making such an estimate.

2. *PLEADING—Special Contracts Under the Common Counts.*—Where work was done under a special contract, which was subsequently abandoned by mutual consent, the amount due may be recovered under the common counts.

Assumpsit, on the common counts. Error to the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 9, 1896.

BREWER & STRAWN, attorneys for plaintiff in error.

REEVES & BOYS, attorneys for defendant in error.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit on the common counts, brought by defendant in error to recover a balance which he claimed to be due him from plaintiff in error, for excavating 22,856 cubic yards of earth at seventeen cents per yard, and for certain other items mentioned in the bill of particulars. Upon a trial by jury there was a verdict for defendant in error for \$1,917.27, and a motion for a new trial being overruled there was judgment on the verdict.

Plaintiff in error operated a sand pit at Millington, Kendall county, Illinois, and on October 7, 1892, contracted with defendant in error to pay him seventeen cents per cubic yard for stripping land adjoining its sand pit, to the extent or amount of 30,000 yards of earth overlying the sand rock.

The whole 30,000 yards were to be excavated and the earth removed before January 1, 1893. McGarry was to be paid on the first of each month, seventy per cent of the amount earned in the preceding month, to be ascertained by the estimates of plaintiff in error's superintendent. The contract was in writing and contained other provisions not necessary for the purposes of this decision to be now mentioned.

Before commencing the work, defendant in error had the ground surveyed and measured by one W. B. Benson, who testified that he was a surveyor and city engineer of the city of Streator. Plaintiff in error also had a survey and measurement of the ground made by one George H. Bremner, an engineer for the C., B. & Q. R. R. Company. Defendant in error proceeded with the work of excavation, commencing on October 16, 1892, and but little was accomplished by November 1st, and no estimate of the amount done was made until December 1, 1892, when the plaintiff in error paid \$1,200 on account. During the winter, the ground being frozen, but little progress was made and the work dragged along until the following June, when, on the 14th of that month, plaintiff in error wrote McGarry that it was dissatisfied, and perhaps the work had better be closed, and it would send over the engineer to measure up the work. Thereupon defendant in error quit and did no further work. In the meantime plaintiff in error had, in the latter part of January, 1893, made a further payment to McGarry, by giving him its note for \$800, which he had discounted at an expense of \$13.55, thus realizing \$786.45, and making a total of payments received by him upon his work of \$1,986.45. There is no dispute about the amount defendant has received, but the controversy relates to the

amount he has earned. After he quit work he had the ground surveyed and measured again by Mr. Benson and from the figures made by Benson, Mr. E. A. Graves calculated the amount of stripping done, and made a total of 21,575 cubic yards.

Plaintiff in error had the ground again surveyed and measured by Mr. Bremner, the C., B. & Q. engineer who made the former measurement for it, and according to his figures the total amount of the excavation was only 11,510 cubic yards.

At the instance of defendant in error one Robert Wilson, a civil engineer, measured the spoil bank, or bank of earth where McGarry had deposited that which he had excavated, and his estimate of the earth in the spoil bank was 11,326.09 cubic yards. Adding to this amount 182 yards which the evidence shows McGarry had shipped to Streator, Wilson's total estimate of the earth removed was 11,508.09 cubic yards or about two yards less than Bremner's estimate. The evidence satisfies us that the estimates made by Benson and Graves were made upon a false and erroneous basis, and are entirely unreliable. Those made by Bremner and Wilson appear to us much more reliable and correct.

We think the court erred in admitting evidence as to the number of days work done, the number of trips made per day, and the capacity of the scrapers used, for the purpose of arriving at an estimate of the amount of earth removed. Such evidence is entirely too unreliable to form any correct basis for making such estimate, while its effect upon the jury would be extremely damaging to plaintiff in error.

Plaintiff in error contends that it is only bound to pay defendant in error for 11,510 yards of earth removed, at seventeen cents per yard, amounting to \$1,956.70, and having already paid him \$1,986.45, it owes him nothing on that account.

It will be for the jury to say upon another trial whether anything is due defendant in error or not. Objection is made that he can not recover under the common counts, as the work was done under a special contract; but inasmuch

as the contract appears to have been abandoned by mutual consent we think if anything be due, he may recover for it under the common counts at the contract price. As to the point that defendant in error is not entitled to interest, we are of the opinion that if anything is found to be still due him, interest would be properly allowable on the amount, it being under a written contract.

Much complaint is made about the instructions, but as the judgment must be reversed for the errors above indicated, we do not consider it important to consider now the various objections raised. The judgment is reversed and the cause remanded.

**C. L. Pritchard Manufacturing Company v. M. J.
Hartney.**

1. *SET-OFF—Assignment of Wages.*—An employe delivered to his employer an order directing the payment of part of his wages to a person therein named, and the employer retained possession of the order but made no payments under it. *Held*, that the employer was not liable on the order and that it could not be set up as a defense to a suit for the amount of wages due.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

N. J. ALDRICH, F. D. WINSLOW and WM. GEORGE, attorneys for appellant; THEODORE WORCESTER, of counsel.

ALSCHULER & MURPHY and W. J. TYERS, attorneys for appellee.

MR. PRESIDING JUSTICE HARNER DELIVERED THE OPINION OF THE COURT.

Appellee, who had been in the service of appellant as secretary and bookkeeper, brought suit to recover for wages and recovered judgment for \$191.04.

There was no serious dispute over the claim of appellee,

but the contest was over two items of set-off, interposed by appellant, which were, by the jury, disallowed. They were a note for \$100, executed by appellee to appellant, in payment of one share of stock in appellant company, and another drawn upon appellant December 11, 1894, for \$200, in favor of John O'Rourke, which appellant claimed to have accepted.

Appellee's defense to the note was that it was given without consideration, and at the request of the president of the company, merely that it might appear on the books of the corporation that appellee was a stockholder, which was done for the purpose of enabling him to hold the office of secretary. He claimed that it was agreed between the parties that the note should not be collected. Over this defense there was a sharp conflict in the testimony of appellee and the president, C. L. Pritchard.

If the note was executed with the understanding and agreement between appellee and Pritchard that it was not to be an obligation of appellee and should not be collected, the defense of want of consideration rightfully prevailed. That was a question coming peculiarly within the province of the jury to decide. We are not prepared to say that they reached an improper conclusion.

The order was not delivered to O'Rourke, nor does it appear that he has ever claimed anything under it. The evidence shows that O'Rourke, a resident of Dubuque, Iowa, had been taking care of appellee's child, and that the order was given to provide for the care of the child, and that creditors of his might not garnishee his wages. The order was left upon Pritchard's desk and had always been in the possession of Pritchard. No obligation against appellant was created thereby, and we are led to the conclusion from the evidence that, in the absence of any effort to garnishee appellee's wages, it was never intended that the order should be paid to O'Rourke.

Appellant was not harmed by the court refusing instructions.

The judgment does justice between the parties and should be affirmed.

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166* 403

Daniel D. Stone v. William P. Palmer, Assignee, etc.

1. **CONTRACTS—*Must be Enforced as Made.***—A contract must be carried out according to its terms, and equity can not create a contract different from the one agreed upon, although there may seem to be a moral justice in doing so.

2. **MORTGAGES—*Must Secure a Particular Debt.***—A mortgage given to secure a particular debt, either present or prospective, can not be enforced as security for another and different debt.

3. **SAME—*Without Consideration.***—A mortgage made without consideration, and under a promise never performed, is void for all purposes as against the mortgagor, whether in the hands of the mortgagee or of a third person who has taken it as security without notice of the want of consideration.

4. **VOLUNTARY ASSIGNMENTS—*Effect of Notice of.***—After a creditor of an insolvent debtor has notice that such insolvent is about to make a general assignment under the statute for the benefit of creditors, he can not receive security for his debt.

Bill, for foreclosure. Appeal from the Circuit Court of Whiteside County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

C. L. SHELDON, attorney for appellant.

J. E. McPHEREAN, attorney for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a bill for relief filed by the appellee as assignee of Adam Horlacker, in the Circuit Court September 7, 1894, against appellant, praying the cancellation of a certain mortgage given by said Horlacker to the latter on the alleged grounds that the note and mortgage given to secure it were without consideration and void as to the creditors of Horlacker, and praying to have it canceled and removed as a cloud.

Appellant answered, denying the allegations of the bill, and then filed a cross-bill, making appellee and Horlacker and wife respondents, asking for a foreclosure of the mortgage. To the cross-bill appellee filed an answer denying

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there was a consideration for the note and mortgage or any delivery of the note and mortgage to appellant.

On hearing of original and cross-bill and answers thereto, the court, after finding the issues in favor of appellee, dismissed the cross-bill and granted the relief prayed for in the original bill, and canceled said mortgage and removed it as a cloud on the title to the real estate described in the bill, and ordered that the land of Horlacker described in the bill be discharged from the lien of said mortgage, and decreed the costs of the proceedings against appellant.

From this decree this appeal is taken.

It appears from the evidence in the case that Adam Horlacker was engaged in the banking business in the city of Rock Falls, Whiteside county, Illinois, in July, 1894, and made an assignment in that month for the benefit of creditors.

The appellant was a depositor in his bank to the amount of \$1,792. On July 30, 1894, Adam Horlacker made and delivered his deed of assignment for the benefit of his creditors to appellee, W. P. Palmer, which deed was duly recorded July 31, 1894, at seven o'clock in the morning, and Palmer, assignee, assumed the execution of the trust in the said deed contained.

On the day prior to the execution of the mortgage and assignment, appellee drew \$1,500 of his money out of the bank and the bank was unable to pay the balance.

On July 30, 1894, Horlacker and his wife, Mary, executed a mortgage to appellant on all the real estate mentioned in the deed of assignment to secure the payment of his note bearing date July 30, 1894 for \$3,000, due in sixty days, payable to the appellant, with the following provisions incorporated in the note: "this note being given to secure said Stone, as my surety in signing a note with me for said sum of money, and this note to remain as security for any renewals or extensions of the said surety note or any part thereof." This mortgage was filed for record at five o'clock in the afternoon of July 31, 1894.

It was a disputed point and the evidence was conflicting

as to whether there was any legal delivery of the note and mortgage by Horlacker to appellant.

There are two points in this case urged on the part of the appellee: first, that there was no consideration for the note and mortgage; that both had been executed upon terms and conditions which appellant had not complied with; second, that the note and mortgage had never been legally delivered to appellant and therefore the recording of the mortgage was a violation of the rights of Horlacker and the appellees.

It is claimed by the appellant that the note and mortgage was executed to him in consideration that he should sign a note with Horlacker as security to some Sterling bank for \$3,000, which, when obtained by Horlacker, the latter was to turn over to appellant in payment of so much of his remaining deposit.

On the other hand the evidence of appellee tended to show that the appellant was only to become security for Horlacker to a Sterling bank for \$1,500, and that there was no agreement to pay even that amount to Stone in part discharge of his deposit account. The evidence is also conflicting as to whether the note and mortgage in question was delivered to appellant or whether it was left in the hands of J. W. White, a lawyer, until appellant should carry out his part of the agreement to sign the note, a note of Horlacker to be given to the Sterling bank on which to raise the \$3,000.

There is no dispute, however, that the note on which appellant was to become security for Horlacker was never signed and Horlacker never raised the money on such note. The fault for not signing this note is attributed to appellant by Horlacker on the one hand and to Horlacker by appellant on the other.

On this point the evidence is also conflicting.

In the view we take of the case it will not be necessary for us to canvass the conflicting evidence on these points, nor to decide where the preponderance lies, for we are of the opinion that the consideration for the note and mortgage, even if delivered by Horlacker to appellant, has failed

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because the consideration on which they are executed never passed between appellant and Horlacker.

It was a contract between appellant and Horlacker to raise money for Horlacker by means of appellant's suretyship, and not a mortgage to secure the deposit account of appellant even though the deposit was to be satisfied out of the sum borrowed.

We think a contract must be carried out according to its terms, and that equity can not create a contract between parties different from the one agreed upon, although there would seem to be a moral justice in doing so.

The contract in question not only contemplated the giving of the note and mortgage, but the execution of a note by appellant as surety for Horlacker.

If Horlacker, any time before the execution of the note, refused to go on and carry out the agreement, the mortgage and the note would be without consideration, because appellant could never be called on to pay a note which he had never signed, and would therefore never have to pay the money which the mortgage was intended to secure, therefore it was without consideration.

It would be like a mortgage given to a party to secure him for lending his credit; if no advances are made upon it and no credit is given, it is without consideration.

If given for that purpose it can not be enforced for a different purpose.

The sum named in the mortgage is of no importance when, in terms, the mortgage secures future advances. It is security for the advances and nothing further. It is valid to the extent of the advances made, although the mortgagor be insolvent at the time. Sections 611, 612, Vol. 1, Jones on Mortgages. And further, "a mortgage made without consideration and under a promise never performed is void for all purposes as against the mortgagor, whether in the hands of the mortgagee or of a third person who has taken it as security without notice of the want of consideration." Sec. 1470, Vol. 2, Jones on Mortgages.

"On the foreclosure of a mortgage given to secure the

payment of judgments confessed by the mortgagor but which were void for want of compliance with the statute, the defense may be taken that no indebtedness is shown and the bill should be dismissed." Sec. 1490, Vol. 2, Jones on Mortgages.

Appellant's counsel bases his claim of the validity of the mortgage upon a supposed equity, and as to what the condition of the parties would have been had the security note been given to the Sterling bank by Horlacker and the appellant. He says, "had the note been given and Stone paid it, as he would have done in default of Horlacker, Stone would have had the right to foreclose the mortgage to indemnify himself;" that is, appellant would have been subrogated to the mortgagee's rights.

The trouble with this argument is that the appellant never went so far as to sign the security note, although he may have been willing so to do had he the opportunity; therefore he never could have been damnified or required to pay a claim which he was secured against by the mortgage. Before he had opportunity to sign the security note he was notified by Horlacker that the assignment had been executed and then it was too late for him to secure his claim even by a direct mortgage by Horlacker to him, if Horlacker had been willing to have given appellant a mortgage to have secured his deposit account.

After a creditor of an insolvent debtor has notice that an insolvent is about to make a general assignment under the statute for the benefit of creditors, he has no power to receive any security for his debt from the insolvent debtor giving him a preference over the general creditors. He has a right to receive security for his debt if it is done in good faith and he secures his lien prior to the assignment or notice of the intention by the debtor to make an assignment.

"If a creditor, by attachment or otherwise, secures a lien upon the property prior to the time that it passes into the hands of the insolvent's assignee, then the said lien would be declared prior—practically, a preferred lien; but when an assignment becomes operative before any such lien is per-

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fectured then those seeking to parcel out the estate of the insolvent in their own interest will either come in under the assignment or be declared non-participants in the avails of the sale of property." *Yates v. Dodge*, 123 Ill. 50.

The policy of our insolvent debtor's statute is to effectuate an equal distribution among all the creditors of an insolvent's property, hence the law will not recognize any liens acquired prior to the assignment unless actual and perfected liens.

It is insisted by appellant's counsel that equity would have required Horlacker to have gone on and borrowed the money and given appellant the opportunity to have signed the note contemplated so that appellant might have been preferred against the other creditors of the insolvent.

As we understand the law, it would not have been equity, in view of the insolvent debtor's act, and Horlacker's determination to make an assignment for the benefit of his creditors, for him to have given preference to appellant, and he might recede from any agreement to do so at any time after he had concluded to make an assignment, and no rule of law or equity could prevent him.

Appellant could not even accept a preference with the knowledge of the debtor's intention to make an assignment, no difference how near he had come to securing a preference before such knowledge came to him. No rule of equity is, therefore, violated in setting aside this mortgage in question, given without consideration and after the assignment, without power to receive any.

The appellant will stand on the same footing with all other creditors and receive his *pro rata* share.

Seeing no error in the record the decree of the court below is affirmed.

Chillicothe Paper Co. et al. v. Charles N. Wheeler et al.

1. PRACTICE—*What Questions Must be Raised in Trial Court.*—Equities against certain of the holders of bonds, secured by a trust deed, can not be set up for the first time in a court of appeal.

2. TRUST DEEDS—*What May be Included in a Decree for Foreclosure.*—When a deed of trust, executed to secure bonds, contains a provision giving a trustee the right to declare the bonds due upon default in the payment of interest, and a suit is brought under such provision, at the request of one of the bondholders, the decree may include all the other holders of bonds, whether they formally pray for a foreclosure or not.

3. JUDICIAL SALES—*Who May Bid.*—A holder of bonds, secured by a deed of trust, may bid either for himself, or for himself and other bondholders jointly, at a foreclosure sale made in pursuance of such deed.

Bill, to foreclose a trust deed. Error to the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

STATEMENT OF THE CASE.

On the 20th of March, 1893, Harvey Lightner and Martin Kingman filed a bill to foreclose a deed of trust upon ten acres of land, and a paper mill plant situated thereon, which had been executed by the Chillicothe Paper Company to secure the payment of forty bonds of \$500 each.

The trust deed provided that the grantor should pay all taxes against the property, keep the buildings insured for the benefit of the legal holders of the bonds, etc., and in case of default in the payment of taxes, interest or insurance for sixty days after the same should mature, then at the request of the holder of ten of the bonds the trustee might declare them all to be presently due and payable, and the mortgage might thereupon be foreclosed.

Lightner was the holder of twenty-four of said bonds, and the Chillicothe Paper Company had failed to pay the interest thereon which matured January 1, 1893, and, as provided by the deed of trust, Lightner had made a written request on the trustees to declare the whole of said bonds due and payable, and to foreclose said mortgage. Kingman united with Lightner in his bill because he was trustee.

Answers were filed by the different bondholders other than Lightner, setting forth their respective interests.

Richard A. Culter, one of the defendants, filed an answer showing that the Chillicothe Paper Company was indebted

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to him in the sum of \$18,830 on its note dated March 25, 1891, which was secured by second mortgage on the premises, and praying that in case of a sale of the property, the surplus over and above the amount due on the first mortgage should be paid to him.

The Chillicothe Paper Co., The Waterhouse Paper Stock Co., a subsequent purchaser, and James A. Waterman were joined as defendants. They were served with process and defaulted for want of an answer.

The case was referred to the master, who filed his report on June 28, 1893, finding the allegations of the bill to be true; that there was due on the Kingman trust deed:

To Harvey Lightner, complainant.....	\$12,952.25
To the Central National Bank.....	5,192.10
To George T. Gilliam.....	3,474.85
To William Schroeder.....	518.75
To Henry Hirt.....	518.95

The above items of indebtedness were all secured by the trust deed to Kingman. The master further found that there was due to Richard A. Culter, secured by second mortgage, \$22,212.10, to James Arkell on a third mortgage \$2,120.66, and that a number of judgments existed in favor of divers parties, all of which were liens subject to above mortgages.

The bonds held by the Central National Bank were held as collateral security for two notes held by the bank, one for \$2,000 and the other for \$3,000 owing by the Chillicothe Paper Co., and signed by James A. Waterhouse as guarantor. The bank held some other collateral, which was then considered of no value.

The master gave notice of his findings to all the parties in interest, and no objections or exceptions were taken thereto.

The master's report was approved by the court, and a decree entered foreclosing, as well, the second and third mortgages, in favor of Culter and Arkell, as the first deed of trust. The aggregate indebtedness due under the three mortgages exceeded \$57,500. The decree provided that

unless the amount due be paid within thirty days, the master should advertise and sell the property described in the deed of trust, subject to the right of redemption.

The property was, on August 14, 1893, offered for sale by the master in chancery and was bid in by William Jack, as trustee, for the sum of \$35,000, and the master took the receipts of the several parties in interest for the amount to which they were entitled. This sale paid the first mortgage in full, and \$11,249.65 upon the Culter mortgage. The sale was approved by the court, and a certificate of purchase was executed by the master to William Jack, in trust.

One year thereafter, upon the ground that the bid was fictitious the plaintiffs in error moved to set aside the sale, which was done without opposition. The property was again, on the 6th of December, 1894, sold by the master, George T. Gilliam being the purchaser, for \$18,000. The proceeds of the sale were divided *pro rata* between Lightner, the Central National Bank, Gilliam, Hirt and Schroeder. The plaintiffs in error moved to set aside that sale on the 6th of December, 1895, because of a secret agreement between Gilliam and others of the bondholders, whereby he was to bid in the property for all the bondholders without paying the cash, but the court denied the motion.

McCULLOCH & McCULLOCH, attorneys for plaintiffs in error.

JACK & TICHENOR, attorneys for defendants in error.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted for the purpose of having set aside a sale made by the master in chancery under a decree of foreclosure of the real estate and manufacturing plant covered by a deed of trust executed by the Chillicothe Paper Company. Although it is urged that the decree is erroneous, the chief contention is that the court erred in refusing to set aside the sale.

The objections to the decree are rather trivial in their character, and being urged here for the first time, although plaintiffs in error have appeared before the Circuit Court twice and moved to have sales set aside because of irregularities of the manner in which they were made, would not seem worthy of very extended consideration.

There is no claim that the amount found due by the decree was not correct. Nor is it claimed that the complainants in the original bill were not entitled to a foreclosure. There was default in the payment of the interest, and for that reason and by virtue of the provisions in the deed of trust, Kingman, the trustee, had the right to declare all of the bonds due and payable. But it is insisted that as the ten bonds held by the Central National Bank were held as collateral security for the payment of other indebtedness of the Chillicothe Paper Company it was error in the court to decree payment of them on the same terms as the other bonds, and in default of payment, together with the sums due upon the other bonds, to decree a sale of the mortgaged premises without allowing a separate redemption as to the bonds so held by the bank. This contention involves an adjustment of the equities between the Chillicothe Paper Company, Waterhouse and the Central National Bank, and could be disposed of by saying that they were not brought to the attention of the court by bill, answer or otherwise. Plaintiffs in error had ample opportunity to obtain such an adjustment had they seen fit to do so. If the bonds were issued for a special purpose and no right of foreclosure attached to them, then it was their duty, for the protection of other bondholders and creditors of the corporation, to set forth that fact in some proper pleading. But that they failed to do. They suffered default, and must now be held as estopped from operating any equitable interest, prejudicial to other bondholders.

Lightner could not be presumed to know of any secret interest which they may have had in those bonds. The bank held, and had the right to hold, the ten bonds until the debt for which they were held was paid, and there is no reason

why other bondholders should be embarrassed in their rights to a foreclosure and a sale by unsettled equities between the bank, the Chillicothe Paper Company and Waterhouse.

To the error assigned, that the decree of foreclosure as to the ten bonds held by the bank was wrong, because there was no prayer of that kind on the part of the bank, it may be replied, that a formal prayer to that effect was not necessary. When one of the holders of the bonds made it known that there had been default in the payment of interest, and called upon the trustee to join him in a foreclosure, the trustee had the right to declare all outstanding bonds due and payable, and the decree could extend to all holders made parties, whether they formally prayed a foreclosure or not. It was not error to decree a sale of all the machinery, fixtures, tools, etc., covered by the deed of trust with the land. That question was settled by our Supreme Court in *Wood v. Whelen*, 93 Ill. 153.

It is contended that the sale to Gilliam, one of the bondholders, was void, and should have been set aside because the decree did not give bondholders a right to purchase and because the purchase was made for all the bondholders. This is the first time we have ever heard it urged in this State that a mortgagee can not purchase at a foreclosure sale made for his benefit. For the mortgagee to so purchase is a matter of daily occurrence. Frequently it is the only way in which a mortgagee can protect himself and obtain payment of his debt. He is not bidding at his own sale but at one made by an officer of the court and under the order of the court. Gilliam had the right to bid either for himself or for himself and other bondholders jointly.

There are other points discussed in the briefs, but we do not consider them of such importance as to merit a further extension of this opinion in a consideration of them. There was no error of the court in the decree or in the order overruling the motion to set aside the sale.

Decree and order affirmed.

Matilda Stewart v. George M. Ludlow.

1. **PROMISSORY NOTES.**—*Proof of Insolvency of Indorser.*—In a suit against the indorser of a promissory note, absolute proof of the insolvency of the maker is not required; the plaintiff need only offer *prima facie* evidence thereof.

2. **SAME—Credits on, upon Foreclosure of Trust Deed Given as Security.**—The indorser of a note secured by a trust deed is only entitled to have such note credited with the net proceeds of a sale of the premises described in the trust deed after payment of all costs of the foreclosure proceeding including any solicitor's fees which were allowed.

3. **ASSIGNMENT—Of Trust Deed Securing Notes—What Passes.**—The assignment of a note and a trust deed securing it, gives the assignee all the rights of the assignor, and when the trust deed gives the right of election to declare the whole amount due on default in payment of any sum that has in fact matured, the exercise of such election binds the assignor to the same extent as the maker of the notes.

Assumpsit, against the indorser of promissory notes. Appeal from the City Court of Elgin; the Hon. R. P. GOODWIN, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 9, 1896.

BOTSFORD, WAYNE & BOTSFORD, attorneys for appellant.

OSCAR JONES and J. M. MANLEY, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought by appellant against appellee, seeking to charge him as indorser on eight promissory notes, which he had sold and indorsed to appellant.

The case was tried by the court without a jury, the issues found for appellee, and judgment rendered against appellant for costs.

There were originally twelve promissory notes for the sum of \$100 each, executed by one Mary Allen to appellee, as part of the purchase price of certain real estate sold by appellee to said Mary Allen. The notes were secured by four

trust deeds on real estate, and each of these trust deeds contained a provision for allowance of a solicitor's fee of \$50 in case of foreclosure.

These notes and trust deeds were sold and indorsed by appellee to appellant. When the first series of notes became due, they were not paid, nor was the interest paid on the remaining notes, and thereupon in pursuance of the terms of the instruments appellant exercised her right of election, declared the whole of the notes to be due, and filed a bill for foreclosure, and in that suit she obtained a decree for the whole amount due, including an allowance of \$150 for solicitor's fees. On a sale of the property by the master, under the decree of foreclosure, there was a deficiency of \$772.27, for which a personal decree was entered against Mary Allen, the maker of the notes, and an execution issued against her which was returned by the sheriff *nulla bona*.

The principal controversy in the case arises upon the question as to whether or not the evidence was sufficient to show the insolvency of Mary Allen, the maker of the notes, and that a suit against her would have been unavailing, and thus fix the liability of appellee as indorser, in accordance with the statute.

We think the uncontradicted testimony of W. J. Hunter as to the financial circumstances of Mary Allen, and the efforts made by him to find property belonging to her, out of which to make the debt, as well as the inquiries made by him of others upon that subject, was sufficient to make out a *prima facie* showing of insolvency on the part of Mary Allen, and to fix the liability of appellee as indorser. The return of the execution *nulla bona* was, at least, strong corroborative evidence of such insolvency.

Absolute proof of insolvency in such cases may be impossible, and is frequently impracticable, and all that should be required is, that the plaintiff shall give *prima facie* proof of the negative fact. *Pierce v. Short*, 14 Ill. 146; *Springer v. Puttkamer*, 159 Id. 567.

Appellee made no effort to show that Mary Allen was the owner of any property, and in the absence of such proof

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we think the *prima facie* showing made by appellant was sufficient.

We think the second and fifth propositions of law submitted by appellant to be held as law in this case should have been so held, and it was error to refuse them.

By assigning the notes and the trust deeds securing them to the appellant, appellee transferred to her the right of electing to declare the whole amount due on default in payment of those which, by their terms had, in fact, matured, and when appellant exercised such election appellee was bound thereby to the same extent as the maker of the notes. The second proposition submitted contained, in substance, this principle, and should have been held as the law of the case.

The \$150 allowed as solicitor's fees in the foreclosure case, having been properly allowed, appellee was not entitled to credit for the amount when sued as indorser upon the notes. He was only entitled to credit for the net proceeds of the sale after payment of all costs of the foreclosure proceedings, including the solicitor's fees. We are of the opinion the deficiency decree properly fixed the measure of his liability if appellant was entitled to recover from him as indorser. Hence the fifth proposition submitted should have been held as the law.

The first, third and fourth propositions submitted were faulty in statement as written, and it was not error to refuse them.

But for the errors indicated the judgment will be reversed and the cause remanded.

Chas. McCorry v. C. L. Holden, Assignee, etc.

1. **CONTRACTS—Construction of—Failure of Consideration.**—The following contract—"We, the undersigned, promise to pay the amounts set opposite our respective names in three, six and nine months, in equal payments, as an inducement to the St. Charles Evaporating Cream Com-

pany to rebuild and operate the condensing factory at St. Charles and in operation"—is complied with by the operation of the factory for even a limited time, if the operation be for as long a time as possible; and if through misfortune the factory cease to operate after being started and run, there is no failure of consideration.

2. *CONTRACTS—Construction of.*—A contract should be construed according to its natural and obvious meaning without adding anything thereto by way of construction.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

ALSCHULER & MURPHY, attorneys for appellant.

BOTSFORD, WAYNE & BOTSFORD, attorneys for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an action brought before a justice of the peace to recover from the appellant an alleged balance due the St. Charles Evaporated Cream Company, on a subscription, the following of which is a copy signed by the appellant:

"ST. CHARLES, September, 1893.

We, the undersigned, promise to pay the amounts set opposite our respective names, in three, six and nine months in equal payments, as an inducement to the St. Charles Evaporating Cream Company to rebuild and operate the condensing factory at St. Charles, and in operation."

There was recovery before the justice of the peace and an appeal taken by the appellant to the Circuit Court where, on a trial before a jury, appellee recovered a verdict for the same amount and judgment was rendered thereon.

The facts in the case outside of the subscription are that some time in the month of September, 1893, the Evaporated Cream Company at St. Charles was destroyed by fire. The officers of the corporation were in doubt about building the factory, and in order to induce them to rebuild, citizens came forward and voluntarily contributed by subscription toward its rebuilding.

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It was rebuilt during the fall of that year and its operations commenced in the month of December that same year.

It continued in operation until July 25, 1894, when the plant and property of the company was levied upon by executions issued on judgments then obtained against the company, and the factory was temporarily closed; and when the sheriff took possession of the same, and shortly thereafter, the assignee, who is appellee herein, was appointed.

The company has no business existence now except through the assignee who was operating the same.

The appellant paid one-third of his subscription March 2, 1894, and one-third about three months thereafter, but has paid nothing since the sheriff took possession of the property, and the remaining one-third is the subject of this suit.

While the evidence shows that the heading "St. Charles, September, 1893," was not on the subscription at the time it was signed by appellant, yet it further shows that it was signed by him during that month and year.

The principal question involved in this case is as to the construction to be given to the subscription paper above set out.

Appellant, through his counsel, insists that the obligation imposed upon the St. Charles Evaporated Cream Company to maintain the operation of the factory at that place is a condition precedent to the payment of the subscription and every part thereof, and that if at any time while any sum remained unpaid upon the subscription the company ceased to operate the factory, there would be a failure of consideration, and that no action could be maintained for any sum remaining unpaid on the subscription, or, in the words of counsel for appellant, to "remain in operation, at least for a time decently sufficient to collect the subscription."

We do not think this is a proper construction to place upon the contract. The payments fixed by this subscription paper were fixed three, six and nine months from the date of the subscription without reference to whether the creamery was rebuilt at the time the different payments respectively came due or not.

If the building had not been completed within the nine months, but was in process of construction, the different installments would have been due just the same and could have been collected by suit, but probably if the payment had been delayed and the execution of the building entirely abandoned appellant might, in a suit to recover on the subscription, have pleaded failure of consideration.

But if the building had been completed and operated even for a short time, there would have been no failure of consideration. The latter part of the contract of subscription is a little obscure, but as we interpret it, it means that the money was to be given as an inducement to the St. Charles Evaporated Cream Company to rebuild and put in operation and operate the factory.

There is no time fixed during which the factory should be operated, therefore we take it that an operation of the factory for even a limited time, would fulfill all the objects of the subscription, provided the factory was operated as long as it could be in good faith by the company, and if through misfortune the factory ceased to operate, after being started and run, there would be no failure of consideration.

The factory was run about twenty-five days after the last installment of the subscription became due by its terms, and then failed and passed into the hands of the assignee.

We are of the opinion that this was a sufficient length of time to fulfill the terms of the subscription.

This, we think, is a fair interpretation of the contract as contemplated by the appellant, inasmuch as he fixed no limit to the time during which the factory should have been operated.

A contract should be construed according to its natural and obvious meaning without imagining or adding anything thereto by way of construction.

Thus holding, we think the verdict of the jury was entirely justified and in accordance with the contract.

The court below, then, committed no error in rendering the judgment or in overruling the motion for a new trial.

The judgment of the court below is therefore affirmed.

Illinois Central Railroad Co. v. Henry Crawford.

1. **RAILROADS**—*When Liable for Injury Caused by Running a Train at a Speed Forbidden by Ordinance.*—It is not essential to a right of recovery against a railroad company for running a train at a speed forbidden by a city or village ordinance, that the injury sued on should have been caused by actual contact or collision with the train.

2. **SAME**—*Are Liable for Injuries Resulting from Defective Condition of Crossing.*—In a suit against a railroad company for injuries caused by the defective condition of a crossing constructed and maintained by it, evidence to show actual notice to the company of the condition of the crossing and its approaches is not objectionable, as the company is chargeable with such notice and is liable for the consequences resulting from a defective condition of the crossing and its approaches.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Will County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

H. M. SNAPP and C. V. GWIN, attorneys for appellant.

COWING & YOUNG, attorneys for appellee; B. OLIN, of counsel.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by appellee in the Circuit Court of Will County, to recover damages for personal injuries sustained by him while attempting to cross the railroad tracks of appellant at their intersection with Corning avenue, in the village of Peotone, on the morning of August 24, 1893.

There was a trial by jury, resulting in a verdict and judgment in favor of appellee for \$1,500 damages and costs of suit.

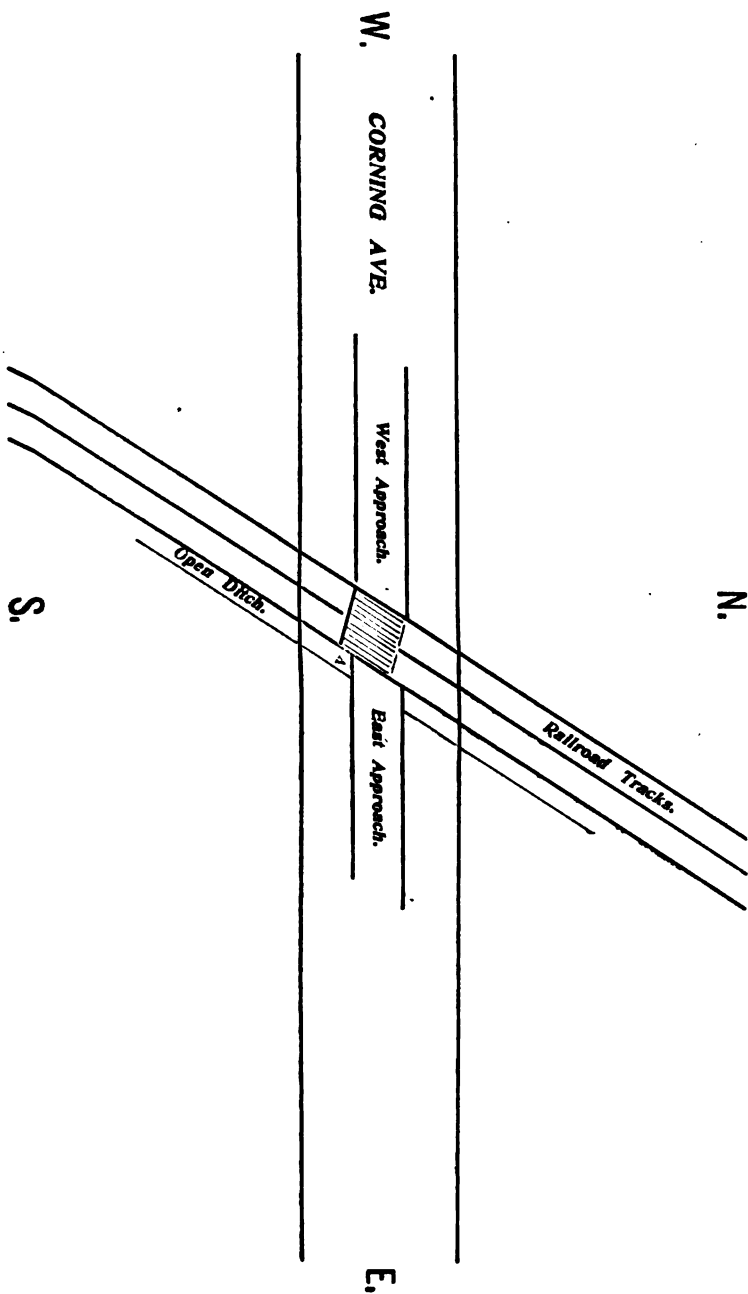
The negligence charged in the declaration, was, in constructing and maintaining a dangerous crossing, running the train at a greater rate of speed than that limited by the

village ordinance, and a failure to give the statutory signals.

At the point of intersection with Corning avenue, appellant had two main tracks and a side track, running in a northeasterly and southwesterly direction, through the village, and Corning avenue runs east and west across these tracks. The approaches to the crossing were made of dirt, gravel and cinders, and ran parallel with the avenue. The crossing over the railroad tracks was made by planking between the rails, and the planks were laid parallel with the rails, and diagonally with the street and east approach to the crossing. This planking or crossing at the east end, on the south side, extended south of the east approach about eight feet, and did not connect with such east approach but left a space of about eight feet on the south side of the same, leading into an open ditch on appellant's right of way, some four feet deep, and which ditch ran along the east side of the embankment on which the railroad tracks were laid.

The following diagram shows the situation of the tracks, the planking forming the crossing, the open ditch, and the location of the avenue upon which appellee was driving at the time of his injury.

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It appears from the evidence that the ditch was concealed by weeds and rubbish, and the fact that the crossing did not connect with the east approach, was not discoverable or easily discernible by one driving along the avenue from the west, so that a person following the south side of the plank-ing would run into the open ditch at the point marked "A" on the plat, before discovering that he was not going on the east approach. The descent was abrupt and dangerous, and there was no guard or railing of any kind erected so as to prevent a person from driving from this crossing into the ditch. There is no dispute that this crossing and the approaches thereto were constructed and maintained by appellant, and we have no doubt from the evidence that the crossing was dangerous.

In addition to this the evidence shows that the view of the railroad to the north, was obstructed by a large elevator, a corn crib, coal sheds, and, at the time of the accident, by a box car left standing on the track, so that one approaching the crossing from the west would have little or no opportunity of seeing a train coming from the north. All these obstructions were on appellant's right of way.

On the morning of the injury appellee and his father came to town in an open buggy for the purpose of taking the 5:40 A. M. train to Chicago, to the World's Fair. They drove into the village from the west along Corning avenue, having a full view of the appellant's railroad tracks to the south, from which direction they saw a train slowly approaching, and from its distance away, appear to have concluded they had ample time to cross ahead of that train, which proved to be the fact. Appellee and his father, William Crawford, both swear they looked and listened for trains from the north, but hearing none, they drove onto the tracks, and just as the horse stepped on the main track, one of appellant's freight trains bore down upon them from the north at a rate of speed estimated by the witnesses to be from twenty to thirty miles an hour. It appears to have been impossible for appellee and his father to turn around and thus avoid the danger; the only hope of escape was to go ahead and clear the track if possible.

The father was driving, and gave the horse a stroke with his whip, which, together with the fright from the train, caused the horse to spring forward, bringing the buggy into the ditch at the point marked "A" on the plat, overturning it, and inflicting upon appellee a very serious injury, which the evidence seems to show will probably be permanent.

The ordinances of the village limited the rate of speed of trains while passing through it, to ten miles an hour. There can be little, if any, doubt, that the train in question was traveling at a much greater rate of speed than the ordinance permitted at the time of the injury. Many witnesses testified upon the question as to whether or not the bell was rung or the whistle sounded, and there is the usual conflict in the evidence upon that point. We can not say the finding of the jury against appellant on that subject was not warranted by the evidence.

There was no error on the part of the court in admitting the ordinance in evidence limiting the rate of speed of trains while passing through the village. It was not essential to a right of recovery that the injury should have been caused by actual contact or collision with appellant's train. The accident appears to have been occasioned by a combination of circumstances, neither of which alone would have caused the injury. Had the crossing and its approaches been properly constructed, probably appellee would have passed over in safety notwithstanding the train was run at a high and dangerous rate of speed, or the fact, if it be a fact, that the whistle was not sounded or the bell rung. On the other hand if the statutory signals had been given, appellee might have been warned in time, and thus avoided the dangerous position in which he was afterward placed.

There was no error in admitting evidence to show notice to appellant concerning the dangerous condition of the crossing. The appellant had constructed and maintained the crossing and its approaches, and hence must be charged with notice of its condition, and if dangerous it was liable for all the consequences which might be attributable thereto. Therefore the evidence tending to show actual notice could do no harm.

We can not say from the evidence that appellee was guilty of negligence or that there was want of ordinary care on his part to avoid the injury. We think the verdict of the jury was warranted by the evidence, and we will not disturb their finding. We find no serious error in the instructions, and the judgment will be affirmed.

Marshall Field et al. v. Joseph Stout.

1. **ATTACHMENTS—Assignments of Property.**—Proof that a son assigned his property to his father to secure debts due to the father and debts that the father had become legally or morally bound to pay, will not sustain an attachment on the ground that the son had fraudulently conveyed his property in order to hinder and delay his creditors in the collection of their debts.

Attachment.—Appeal from the Circuit Court of La Salle County: the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

HALL & HAIGHT, attorneys for appellants.

McDOUGALL & CHAPMAN, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

On the 23d of February, 1895, the entire stock of goods which appellee, a retail merchant at Wenona, Illinois, owned, was destroyed by fire. It was insured for \$10,000. Appellee was at the time indebted to the amount of \$14,000 or \$15,000. He was indebted to appellants \$637.03. He owed his father about \$1,500, and his father was, in addition, bound as security for him to the extent of several thousand dollars.

On the 25th of February, 1895, appellee assigned the insurance policies to his father, who subsequently obtained an adjustment of the loss for \$9,400, which was all applied upon the indebtedness.

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On the 26th of February appellants commenced suit by attachment, claiming that appellee had fraudulently assigned his property for the purpose of defrauding his creditors. The issues upon the attachment were decided in favor of the defendant, but the jury found the defendant was indebted to the plaintiffs in the sum of \$637.03, and judgment was rendered accordingly.

Appellants ask a reversal of the judgment as to the attachment.

The only question involved is whether the assignment of the policies of insurance to appellee's father was for the purpose of hindering and delaying appellee's creditors in the collection of their debts. That appellee had the right to prefer his father and other of his creditors, is too well settled in Illinois to require the citation of authorities.

The purpose of the assignment was to enable the father to pay in full his own debt and the debts that he had become legally and morally bound for.

It does not seem that there was any intention that appellee should have returned to him any part of the money that should be collected on the policies, or that there was any arrangement or understanding that any of it should be used except in discharge of legal indebtedness.

Every dollar was used in that way. The verdict and judgment were right, and it is unnecessary to discuss instructions.

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1. **TENDER**—*Must be Kept Good*.—A person relying upon a tender must keep it good by bringing the money or other article into court.

2. **ESTOPPEL**—*Tenant Can Not Deny Landlord's Title*.—In a suit for possession of property, a tenant who had accepted a lease from the plaintiff and attorned to him, is estopped from setting up any defense under a lease from a former owner of the land.

Forcible Detainer.—Error to the Circuit Court of Lake County; the Hon. CLARK W. UPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

COOKE & UPTON and H. S. MECARTNEY, attorneys for plaintiff in error.

WHITNEY & UPTON, attorneys for defendant in error.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of forcible detainer commenced before a justice of the peace, by plaintiff in error against defendant in error, to recover the possession of certain premises occupied by the latter and claimed to be owned by the former. Plaintiff in error had judgment before the justice, but on appeal to the Circuit Court and a trial in that court without a jury, the defendant was found not guilty and judgment was rendered against plaintiff in error for the costs. The evidence and the arguments of counsel, seem to leave it a matter of some doubt as to what are the exact rights of the parties. It appears that on September 24, 1890, plaintiff in error executed to defendant in error a lease for the premises in controversy, which was to commence on that date and terminate on April 1, 1891, the expressed consideration being one dollar, and a provision that the lessee should take care of the leased property and other property of the lessor in that vicinity. This lease contained the usual covenants as to surrender of possession at the expiration of the term demised.

But there was another instrument in writing executed between the parties about the same time, containing a different agreement, to the effect that defendant in error should remain in the possession of the leased premises as a tenant at will until they were sold by plaintiff in error, and upon the happening of that event, the agreement provided that plaintiff in error should convey and quit-claim to defendant in error a certain 47½ acre tract of land therein described, and should pay to him the sum of \$500, and he should thereupon surrender the possession of the leased premises. The principal buildings on the leased premises were owned by defendant in error, who kept the place as

a sort of pleasure resort on Diamond Lake in said Lake county. The reasons why these apparently conflicting agreements were made between the parties, or what their respective rights and interests in the premises had theretofore been are not satisfactorily shown by the evidence, but the plaintiff and defendant are half brother and sister, and there would seem to have been some prior dealings or rights in the property which do not clearly appear.

However, defendant in error remained in the occupancy of the premises until in September, 1894, when plaintiff in error sold the same to one Joseph Peterkort and on November 9, 1894, Clair D. Vallette, husband of plaintiff in error, acting as her agent, tendered to defendant in error a deed for the $47\frac{1}{2}$ acre tract, and also the \$500 as provided for in the agreement, and demanded immediate possession of the leased premises. Defendant in error refused to surrender the possession and declined to receive the alleged tender, and on the next day this suit was brought. This alleged tender was in writing, and was conditional in that it required immediate surrender of the possession of the whole of the demised premises, including the buildings thereon, which there seems to be little, if any, dispute, belonged to defendant in error. It may be doubted whether this was a good tender under the circumstances, but however that may be, such as it was, it was not kept good, there being no tender deposited with the justice, nor in the Circuit Court, nor was there any offer on the part of plaintiff in error to perform the agreement of September 23, 1890. On the contrary, she immediately afterward brought another forcible detainer suit to recover the possession of the $47\frac{1}{2}$ acre tract, which, by the terms of her agreement, she was to convey to defendant in error. Although no propositions of law were asked or held for defendant in the court below, the court seems to have been of the opinion that in order to avail of the alleged tender, it should have been kept good by bringing the deed and money into court. Upon this proposition we think the court was right.

Notwithstanding the lease of September 24, 1890, which

by its terms expired in one year, defendant in error continued in the possession of the premises until September 24, 1894, and from the conduct of the parties it is evident they all considered he was holding under the agreement and not under the lease. This is manifest from the alleged tender made when the premises were sold. It must be held, therefore, that the agreement fixed the rights of the parties, and plaintiff in error was bound to perform on her part before she was entitled to the possession. If it be held that her tender was good, she was bound to keep it so by bringing the deed and money into court and offering to perform. This she did not do, but brought the suit to recover possession of the 47½ acre tract as we have already stated, thus, in effect, repudiating her agreement.

On December 5, 1892, one A. V. Smith obtained a tax deed for the premises in dispute, and he quit-claimed his interest to defendant in error, and these deeds were offered in evidence by defendant but rejected by the court. Plaintiff in error insists that the attempt of defendant to set up an adverse title in himself put an end to the tenancy and authorized her to bring suit at once for the possession. But the evidence as to any attempt of defendant in error to set up such title in himself, is at best unsatisfactory, and we see no reason for disturbing the action of the court so far as that question is concerned. The defendant in error was not in a position to defend in this suit under the lease from Singer, a former husband of plaintiff in error and the owner of the property when the last named lease was made. By accepting a lease from plaintiff in error and attorning to her after she succeeded to the ownership of the property, defendant in error would be estopped from setting up any defense under the Springer lease. We are of the opinion the rights of the parties to this suit must be determined from their written contracts.

Evidently the court below so held, and finding no error in the record the judgment will be affirmed.

The County of Kankakee v. The Town of Manteno.

1. *PAUPERS—Application of Special Acts.*—The act of February 20, 1861, entitled, "An act to require each town of Kankakee county to take care of its poor," does not apply to a poor person who is not within the statutory definition of a pauper.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

H. K. WHEELER and J. BERT MILLER, attorneys for appellant.

HARRISON LORING, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellant to recover from the town of Manteno \$72 for the board and care of one Henry Codiere, furnished at the county poorhouse.

Upon a trial without a jury, the court found for the defendant and rendered judgment accordingly.

The facts as disclosed by the evidence are that Codiere, who was a common laborer, without a family and without property, and a resident of the town of Manteno, was injured by a freight train on the Illinois Central Railroad at that place while attempting to cross the track; that he was placed aboard a train and taken to Kankakee, a distance of nine miles, and that from there he was taken to the county poorhouse, where his leg was amputated and where he remained until he died. It does not appear that he was taken to the poorhouse with the knowledge or consent of any officer of the town of Manteno, nor does it appear that he had ever, up to the time of the accident which resulted in his death, been a pauper charge.

No point was raised as to the charge being reasonable, and

the only question involved is, whether the county can recover against the town of Manteno for the board and care of Codiere while he was an inmate of the county poor-house.

In the case of *Scobey v. Town of Manteno*, 56 Ill. App. 336, a suit to recover for services in assisting to amputate Codiere's leg, the facts of this case were before us. We were then of the opinion that Codiere did not come under the ordinary definition of "pauper," but came within the class provided for in section 24 of the pauper act, Chap. 107 Rev. Stat., which reads:

"When a non-resident, or any person not coming within the definition of a pauper of any county or town, shall fall sick, not having money or property to pay his board, nursing or medical aid, the overseers of the poor of the town or precinct in which he may be shall give or cause to be given to him, such assistance as they may deem necessary and proper, or cause him to be conveyed to his home, subject to such rules and regulations as the county board may prescribe, and if he shall die, cause him to be decently buried."

We are of the opinion that all cases coming within that section are county charges.

Appellant claims, however, that its right to recover is based upon a special act of the General Assembly passed February 20, 1861, entitled, "An act to require each town of Kankakee county to take care of its poor."

The first section of the act provides that "the several towns now created or that may be hereafter created in the county of Kankakee be and they hereby are empowered and required to support all paupers residing within their respective limits out of the treasury thereof."

That act was passed prior to the last general revision of our statutes. It is contended by appellee that by the revision of the pauper act (Chap. 107, Rev. Stat.) the towns of Kankakee county were relieved from the care of that class of persons who do not come within the definition of pauper. This seems to us a proper ground for contention.

But a careful and proper construction of the act of 1861

Pacey v. Troxel.

leads us to the conclusion that it was not intended by that act that persons belonging to the class of which Codiere was one should be a charge against the town.

The judgment of the Circuit Court was right.

H. E. Pacey et al. v. Fred Troxel and John Hari, for use of Wanzer & Co.

1. *SALES—Demand for Property Sold.*—Where a contract required the delivery of corn and payment therefor on delivery, no demand for delivery or tender of the money was necessary, and if the purchaser was ready, able and willing to pay for the corn when delivered, he may maintain a suit for the breach of such contract.

Assumpsit, on a contract of sale. Appeal from the Circuit Court of Iroquois County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

C. H. PAYSON and NELLY B. KESSLER, attorneys for appellants.

FREE P. MORRIS and FRANK L. HOOPER, attorneys for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This case, in all its material facts, is the same as that of *Brassel v. Troxel and Hari, for use of Wazner & Co.*, filed at the May term of this court and decided in opinion filed contemporaneously with the opinion in this case, except as to the amount of corn to be delivered, which was three thousand four hundred bushels, and the judgment was \$340 against appellants, contractors to deliver the corn.

The points of law raised by appellants are the same as in the *Brassel* case, except it is claimed that no demand for delivery was made upon the appellant Pacey, or no tender made of the money for the corn. We hold the same in this

case as we held in that case, and refer to our opinion therein filed, for the reasons for our decision in this case.

As to the other point made herein, we think no demand or tender was necessary.

The contract required appellants to deliver the corn and appellees to pay for it on delivery, and one dollar to each of the appellants in addition to the forty cents per bushel.

All that the contract required, therefore, on the part of the appellees was to be ready, able and willing to receive the corn when delivered or offered to be delivered; and, as no such offer of delivery was made, the appellants were clearly in default.

The judgment of the court below is therefore affirmed.

Alice F. Fritzsche et al. v. Frederick Herb.

1. *DOWER—Rights of Widow in Case of Non-assignment of.*—Sec. 6 of Chap. 181, R. S. 1874, saves from the effect of section 5 of the same chapter all rights existing at the time such statutes went into force, and a widow who, prior to July 1, 1874, acquired the right to retain possession of the dwelling house of her husband together with the outhouses and plantation thereto belonging until dower was assigned, was not deprived of that right by section 5 of said chapter.

Assumpsit, for rents and profits. Appeal from the Circuit Court of Henry County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896.

GRAVES & BROWN, attorneys for appellants.

JOHN P. HAND, attorney for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit by the appellants against appellee seeking to collect rents and profits for the use and occupation of a certain eighty-acre tract of land.

The case was tried on an agreed state of facts, and evidence introduced as follows:

Fritzsche v. Herb.

PLAINTIFF'S CASE.

Stipulation as to facts offered in evidence, that John Jobst died intestate October 1, A. D. 1873, and left surviving him Amelia Jobst, now Amelia Herb, his widow, who married defendant May 3, 1887, and Mary T. Jobst, Alice F. Jobst, now Alice F. Fritzsche, Franklin C. Jobst, who died June 5, A. D. 1889, Lewis F. Jobst, Lydia J. Jobst and Minnie L. Jobst, now Minnie L. Franklin, his only sons and daughters. That since the marriage of the said widow and the defendant there has been born to them Frederick Herb, Jr., and Rosa Herb, who are minors. That John Jobst died seized in fee of the premises described in the declaration, and resided on the same at the time of his death, with his wife and family. That the said defendant and his wife, and the children of his wife that remained at home, resided on said land until March 12, A. D. 1883, and on that day moved to Wessington, South Dakota.

From that time until November, A. D. 1893, said premises were occupied by a tenant, at which time defendant and wife and minor children moved back upon said farm and occupied it until same was sold under a decree in a suit in partition on August 24, A. D. 1894. That after marriage of defendants until said sale, his wife permitted defendant to receive and he did receive the rents and profits from said land as head of the family. That said farm consisted of eighty acres. That the reasonable rental value of that land was \$3.50 per acre, per annum. That Amelia, Rosa, and Frederick Herbert, Jr., were made plaintiffs, because other plaintiffs were advised it was necessary. That the dower of Amelia Jobst, now wife of defendant, was never assigned until after partition suit was commenced on April 1, A. D. 1893, final decree being entered June 25, A. D. 1894. Parties reserve right to introduce all other competent testimony they may desire on trial of said cause. Plaintiffs rest their case in chief.

In addition to this, the papers in a partition suit wherein Minnie L. Franklin was plaintiff were introduced in evidence, showing that the partition suit in question was for the pur-

pose, among other things, of assigning the dower of Amelia Herb, formerly Jobst.

The petition, among other things, set up the dower interest had never been assigned to the widow of John Jobst and asked its assignment, and the petition prayed that Amelia Herb be required to bring into court all the proceeds of the said premises received by her since the death of her husband to be distributed among the parties according to their interest.

The master's report showed the correctness of the various allegations of the petition and that the said lands were the homestead of the said John Jobst, deceased, at the time of his death; that his wife lived with him at the time and that she continued to occupy the premises as a homestead and had the exclusive use of it after her husband's death and took care of the family, they being nearly all minors, and lived with her until March, 1883, and that she received all rents from the date of the death of her husband until 1893.

She says Carvin paid her \$3.60 per acre for years and the rent was worth \$3 per acre per annum the balance of the time; that her dower in the land had never been set off.

The bill in partition was then amended with the additional allegation that Amelia Herb had the entire use of the premises described from the death of John Jobst to the time of filing of the bill.

Amelia Herb, widow of John Jobst, answered and denied the plaintiff's right to relief with regard to the part which asked that the rents received by Amelia Herb be brought into court for distribution.

The evidence introduced in that case showed that all the children of John Jobst were above the age of twenty-one years and that after his death his widow married Frederick Herb May 3, 1877, and had lived with him ever since, and that two children were born after the said marriage, Rosa E. and Frederick C., both minors, then residing with their mother.

After 1883, the evidence showed that Amelia Herb and her husband, the defendant in the case, lived off the premises

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and received the rents thereon during the time of their absence, and that they moved back on the premises March, 1894, and then resided there, at the time the evidence was taken.

She had moved a house on the land and also built a stable on it and laid tile on it.

The court in the partition suit rendered a decree of partition and appointed commissioners to make the partition, which commissioners set off dower therein to Amelia Herb and reported the remainder indivisible and valued it at \$60 per acre.

The Circuit Court rendered a decree confirming the report of the commissioners and ordered the sale of the land subject to the dower interest of the widow. The master in chancery made a sale of the premises to Frederick Herb for the sum of \$3,910.

There was a decree confirming master's report of sale and ordering a distribution of the money.

The court took no account of the question raised as to the rents and profits, and Amelia Herb's alleged quarantine interest. Frederick Herb, the defendant, received the rents and profits on the land after his marriage with Mrs. Jobst as her husband, by her permission, and the proceeds were used in the support of the family.

Formal pleadings were waived, except the general issue, and that all defenses might be made under that issue that could be made under any.

The case was tried by the court without a jury and the court found the issues for the defendant.

The plaintiff excepted, and moved the court for a new trial, which was overruled, and then rendered judgment against appellants for costs, to which overruling the motion and rendering the judgment the plaintiff excepted.

This suit is brought by the heirs of John Jobst to recover the proceeds of the land since the same has been occupied and managed by him. The widow of John Jobst, Amelia Herb, and the children of Frederick Herb and his wife were also joined as plaintiffs because they each inherited a frac-

tion of the undivided one-seventh interest of Franklin C. Jobst, deceased, son of John Jobst and half-brother to Herb's children, the latter thereby becoming tenants in common with the full brothers and sisters of Franklin C.

The position of the appellants as stated by counsel is that they, as the owners in fee of the land, are entitled to the rents and profits arising from its use, subject only to the widow's dower.

The appellees contended in the court below for two propositions as a defense to the action.

First, that the partition proceedings already mentioned, the papers of which were introduced in evidence, amounted to a former adjudication of the rights of the parties to this suit in regard to the matters in controversy herein.

Second, that section 27 of chapter 34, Revised Statutes, 1845, gave to the widow a vested right to retain the possession and use, rent free, of the entire estate until dower was assigned.

The appellants deny the correctness of these propositions.

As to the question first raised, while it is a serious one, we do not think that it is necessary for us to consider and determine whether the partition proceedings were a bar to this action or not, for the reasons which we will note hereafter.

We will now proceed to consider the second proposition, to wit:

Whether the appellees have a right to claim the rents and profits in question under the widow's quarantine act of 1845.

Section 27 of the dower act of 1845 reads as follows: "The widow in all cases may retain the full possession of the dwelling house in which her husband most usually dwelt, together with the outhouses and plantation thereto belonging, free from molestation and rent until her dower be assigned."

Appellants' counsel admit that unless the quarantine act was repealed, the right existed as contended for by the appellees to enjoy the rents and profits; therefore it will

not be necessary for us to discuss that question or cite any authorities in its support.

The appellants insist that section 27 of the quarantine act above cited was repealed by the general revision of 1874, which went into force the July following the death of John Jobst. Counsel assume that such act was absolutely and unconditionally repealed as far as the rights of Jobst's widow were concerned; that unless it was beyond the power of the legislature to so repeal such act as to affect the widow's rights in this case then the statute was rendered null as to such rights.

And counsel contend that unless a widow's right to quarantine in the homestead after the death of her husband is what is termed in law to be a vested right, then her rights ceased under the act of 1845, and she had no further claim for a quarantine use of the premises. Then an exhaustive argument is entered into to prove that such rights are not vested rights but are liable to be repealed and annulled at any time the legislature may see proper.

Counsel for appellee combats such argument in his brief and tries to show that appellees' rights are, in law, what are known as vested rights.

In the view we take of the case we do not think it necessary for us to discuss or determine that question, that is, as to whether the widow's rights, under the facts of the case, were vested beyond the powers of the legislature to repeal when the repealing act of 1874 was passed.

We understand from the second section of that act existing rights, whether vested or not, were saved, and the statute did not attempt to affect them.

By section 1, chapter 131, entitled "An Act to Repeal Certain Acts" therein named, the act in which the quarantine act was made a law, among others, was repealed, and in force July 1, 1874.

The act mentioned as being repealed is as follows: "An Act for Revising and Consolidating the General Statutes of the State of Illinois," approved March 3, 1845; except chapter 104, entitled "Trespass."

This is the title to the revision of 1845, and repeals all of the revised statutes of 1845, except the chapter entitled "Trespass."

Section 2 of said act of 1874, has the following saving clause: "Section 2. The repeal of the acts and parts of acts mentioned in the preceding section shall not affect suits pending or rights existing at the time this act takes effect. * * * Nor shall such repeal as above mentioned be taken, construed or held to avoid or impair any grant made or right acquired or cause of action now existing under any such acts or the amendments thereto, but as to all grants made or rights acquired or cause of action now existing said laws shall be continued in full force and effect."

The last part of the section provides that repeal of a former limitation law should not be construed to stop the running of any statute but the time shall be construed as if such repeal had not been made. Revised Statutes of 1874, Hurd's Revision, page 1381.

It will be seen from the agreed state of facts that Amelia Herb acquired the right of quarantine October 1, 1873, and retained possession of the homestead and premises of her husband, John Jobst, deceased, from that time on until 1874, and she had acquired the right of quarantine long before the repealing act of 1874 was passed. By section 2 above quoted, her right to the quarantine in her former husband's homestead and premises had been acquired and was then subsisting, and the legislature refused to repeal the quarantine act so as to affect that class of rights, no difference whether legally vested or not, in such a way that the legislature was without power to repeal. Her rights were acquired and are clearly covered by the saving clause.

By section 2 a number of rights were saved from the effect of the repealing act other than vested rights; among them the former limitation acts repealed were saved so far as cases had arisen under it, and where the limitations had commenced to run.

It therefore follows that the widow, Amelia Herb, had a right to claim the rents and profits of the land in question

Singer Mfg. Co. v. Foster.

until her dower should be assigned, which was not done until 1894, when the land was sold under the partition proceedings.

There being no error in the record the judgment of the court below is affirmed.

The Singer Manufacturing Company v. Otto E. Foster.

1. VERDICTS—*Against the Weight of the Evidence.*—When the verdict is manifestly against the weight of the evidence a judgment rendered in pursuance thereof will be reversed on appeal.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the December term, 1896. Reversed. Opinion filed December 11, 1896.

W. H. SAVARY, attorney for appellant.

H. L. RICHARDSON, attorney for appellee.

PER CURIAM.

The appellee entered into a written contract with the appellant to act as "supervising salesman" and manager of the appellant's business at Streator, Ill., in October, 1895, and worked for the company about sixteen weeks. The contract was, in substance, that appellee was to receive in full for all his services except commissions a salary of \$12 per week, payable weekly, lost time to be deducted, and was to make "an average of one good and acceptable sale or lease for each week's salary drawn by him, and agreed to refund five dollars in cash for each sale or lease he fell short of this average," and for each such failure appellant was to deduct said five dollars from appellee's commissions.

In addition to the above appellee was to receive twenty per cent commission on all approved sales and leases of family sewing machines at retail price made by the appellee.

There were other provisions in the contract not necessary to notice.

The evidence conclusively shows that appellee failed to make sales or leases of any machines during seven weeks of the sixteen he worked for the company, and for which he had received his salary of \$12 per week, and the appellant was entitled to have offset against appellee's commissions, \$35. The evidence shows that appellant only owed appellee on commissions and other accounts, some \$26. Yet the jury returned a verdict for appellee for \$37, on which judgment was rendered against appellant.

The verdict was manifestly against the weight of the evidence.

The appellant was entitled to an off-set as against appellee's account of a sum equal to the entire amount of his claim, hence the verdict should have been in its favor.

The judgment of the court below is reversed and the cause not remanded, there being no cause of action, with costs against appellee.

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Wm. A. Gray et al. v. Justus S. Wulff.

1. WORDS AND PHRASES—"Long Engagement."—In a suit for a wrongful discharge, it was shown that the plaintiff had written the defendant previous to the employment, saying, "I would prefer your house if you can guarantee a long engagement," and, that the defendant had replied, "Be here Thursday evening." *Held*, that the term "long engagement" has no certain meaning; that there was no employment for a definite time, and that the defendant had the right to discharge the plaintiff on giving him the customary notice.

Transcript, from a justice of the peace. Appeal from the County Court of Peoria County; the Hon. R. H. LOVETT, Judge, presiding. Heard in this court at the December term, 1896. Reversed. Opinion filed December 17, 1896.

SHEEN & GRAY, attorneys for appellants.

WHITMORE & BARNES, attorneys for appellee; H. C. FULLER, of counsel.

Gray v. Wulff.

PER CURIAM.

This is an appeal from a judgment for \$125 recovered by appellee in a suit against appellants to recover a salary as leader of an orchestra in appellants' opera house at Peoria.

The suit was defended upon the grounds that appellee was incompetent, and that appellants were therefore justified in discharging him; that the hiring was not for a definite period of time, and that when discharged the usual time of notice to quit was given appellee, and he was paid in full up to the end of the notice.

It is clear that appellee can not recover under his contract of employment, unless the employment was for a definite time, or unless he was discharged by appellants without notice. He was fully paid for the service actually performed by him. There had been some correspondence between the parties when appellee sent to appellants the following letter:

MUNCIE, IND., NOV. 7, 1895.

211 Washington St.

SIR: Yours of October 31st was delayed. In your former letter you said you would "write and send contract as soon as you heard from me." I answered that at once; not hearing from you for three weeks, I looked for work here and am now playing in a small house here. The pay is better than what you offer. Still, this is a variety house and I would prefer your house, if you can make salary \$15 weekly, payable weekly, and can guarantee me a long engagement. Let me know as soon as possible, at least one week ahead. Will await word from you until next Monday.

Respectfully,

J. S. WULFF.

Afterward appellants sent the following telegram:

"PEORIA, ILL., November 30, 1896.

J. S. Wulff, Leader of Orchestra,

Muncie, Indiana.

Be here Thursday evening rehearsal for opening show.

L. H. WILEY."

The evidence does not show any further or later contract.

The term "long engagement" is quite uncertain. There was no employment for a definite time. Appellants had the right to discharge him on giving him the usual and customary notice.

They had that right independent of the question whether he was competent, and for that reason it is not necessary for us to express any views upon that question.

It appears from the evidence that one week's notice is the usual and customary one in such cases. The testimony of L. H. Wiley and F. D. Kelley is that such notice was given.

Appellee testified that no notice which he considered proper was given. But we think that his own testimony showed sufficient notice. It was to the effect that after he was told, as he was, that a company carrying its own orchestra would occupy the house, and that he would not be needed, he applied to Wiley, the manager, and was told by him in reply as to whether he could go to Chicago for a few days, that yes, he could go to hell. This language may not have been as elegant as might have been employed by Wiley, but it shows he did not wish to retain appellee at the head of the orchestra. Further than this it appears that Wiley threatened appellee with arrest if he continued to crowd himself into the place which he had been occupying before his discharge.

The case is without merit, and upon the plaintiff's own showing no recovery should stand. We therefore are of the opinion that the judgment should be reversed, but that the cause should not be remanded.

Anthony W. Bastian et al. v. The Modern Woodmen of America et al.

1. **REPEALS—By Implication Not Favored.**—Repeals by implication are not favored in this State, and a statute should not be held to be so repealed if it can be reasonably avoided. Unless it is manifest that a repeal was intended by the legislature, the former act should be considered in force.

Bastian v. Modern Woodmen of America.

2. FRATERNAL BENEFIT SOCIETIES—*May Transact Business Outside of State.*—The act of June 19, 1893, authorizing certain companies to do business outside of this State was not repealed, so far as fraternal benefit societies are concerned, by the act of June 22, 1893, in relation to fraternal benefit societies, or the act of the same date in relation to assessment insurance companies.

Bill, for injunction. Appeal from the Circuit Court of Whiteside County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Mr. Justice CRABTREE, dissenting. Opinion filed February 12, 1897.

JOHN M. HAMILTON and F. D. RAMSAY, attorneys for appellants.

J. G. JOHNSON and JACKSON & HURST, attorneys for appellees.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was a suit in chancery commenced by appellants, members of the order of Modern Woodmen of America, to enjoin the chief officers of the order from removing its principal office from Fulton, Illinois, to Rock Island, Illinois.

The Modern Woodmen of America is a secret, fraternal and benevolent life insurance society, with lodge organizations called camps, and has a membership of many thousands, extending over several States. It was incorporated in 1884, under the laws of Illinois, governing the formation of corporations and for pecuniary profit. The principal office and place of business was located and fixed in its certificate of incorporation at Fulton, Illinois. Its supreme legislative and governing body is called the head camp, which meets in regular biennial session at such time and place as the preceding head camp may have determined. One of the fundamental laws of the order reads: "The laws may be amended at any special or regular session of the head camp by a two-thirds vote of the authorized delegates present."

At a meeting of the head camp, held November, 1893, at Omaha, Neb., at which 103 delegates were present, the proposition of locating the principal offices of the order was voted upon. Several cities in Illinois contended for the location, and the vote was as follows: Rock Island, 56; Peoria, 27; Fulton, 15; Springfield, 4; Bloomington, 1. Rock Island was declared to be the choice of the head camp and the board of directors and head officials were directed to take the necessary steps to accomplish the removal of the head office from Fulton to Rock Island.

Upon the ground chiefly that the vote in favor of removal to Rock Island was not by two-thirds of the delegates present, appellants, who are resident members of Fulton, presented this bill to restrain the chief officers from making the removal. The contention in the bill was that the resolution adopted by the head camp directing the removal was void, because it was not passed as an amendment to the fundamental laws by a vote of two-thirds of the delegates present, and because the head camp could not lawfully adopt such resolution while sitting outside of the State of Illinois. A temporary injunction restraining the removal of the office was granted, which is in force pending this appeal.

Appellee filed an answer denying that the resolution for removal was void, and averred that all steps taken by the head camp at Omaha to that end were legal and regular.

At the October term, 1895, appellees filed a supplemental answer in which it was shown that at a session of the head camp held at Madison, Wis., in June, 1895, it was ordered by a two-thirds vote of the delegates present that the by-laws be amended by the adoption of a new section, to wit:

"The articles of association of this corporation may be changed at any regular session of the head camp by a resolution designing and setting forth the change sought to be made, said resolution to be adopted by at least two-thirds of the members present at said head camp, and entitled to vote thereat."

It was shown also that the following resolutions were adopted by a unanimous vote:

“That the board of directors of this order have power and are hereby required to amend the articles of association and the fundamental laws of this order in such particulars as the same may be directed to be done by a vote of two thirds of the members of any head camp, by a certificate signed by the head counsel or head clerk, attested by the seal of the corporation, and that this resolution or rule take effect from and after its passage.”

And the following was adopted by a vote of 232 to 9:

“Resolved, by the members of this head camp, that the location of the principal office of this order be changed from Fulton, Illinois, and be established at Rock Island, Illinois, and that the board of directors be required to amend the articles of association and the fundamental laws of the order, making Rock Island the place of permanent location of the principal office, and that said board be required to take steps, as soon as practicable after such amendment is made, to effect such change.”

That after adjournment of the head camp a full meeting of the board of directors of the order was held at Fulton, August 21, 1895, and the following resolution was unanimously adopted:

“Whereas, the head camp of this order, at the late session held at Madison, Wisconsin, June 4 to June 8, 1895, by a vote of its members, changed the location of the principal office from Fulton, Illinois, to Rock Island, Illinois, and by resolution instructed this board to take the proper steps to make the change effective,

Therefore be it resolved, that in accordance with said instructions of the head camp to this board, and in compliance with the laws of Illinois, the head clerk of this corporation is hereby directed to prepare a certificate of said action of the head camp in so changing the location of its principal office, and cause said certificate to be signed by the board of directors of this corporation, and the chairman of this board is hereby directed to present said certificate to the auditor of public accounts of the State of Illinois for his approval of such change, and after having

the approval of said auditor indorsed thereon, to file the said certificate so approved in the office of the secretary of state of Illinois, and also file a copy of said approved certificate by said secretary of state in the office of recorder of deeds in and for Whiteside county, Illinois."

The supplemental answer further stated that a certificate was prepared by the head clerk in conformity with the resolution of its directors; that it was approved by the secretary of state and commissioner of insurance of Illinois and filed and recorded as directed.

After hearing, the court found the issues for defendants and dismissed the bill for want of equity, at the costs of appellants.

The evidence in the record sustains the allegations in the supplemental answer. As we regard the defense interposed by it as complete, we deem it unnecessary to consider the validity of the proceedings at Omaha.

Prior to the general assembly of 1893 there was no legislative authority for the Modern Woodmen of America to provide for the removal of its chief office at a session held outside of the State. At that time, however, there was enacted as an amendment to the law under which the order was incorporated the following section, which, by virtue of being passed with an emergency clause, went into effect June 19, 1893:

Sec. 18a. "Any corporation, association or society that has heretofore or may hereafter organize under the act designated in Sec. 1 of this act, or that has been organized under an act of which said act designated in said Sec. 1 is an amendment, may transact any business outside of the State of Illinois that it can or may do in the State of Illinois, and any business heretofore transacted outside of this State by any such organization, which would be legal if done within this State, is hereby legalized and made valid."

That amendment removed the extra-territorial infirmity. Acting under it, the head camp at Madison passed the resolutions above quoted, and the board of directors subsequently made the order to carry the resolution into effect.

Appellants contend, however, that the amendment, "Section 18a," was repealed within a few days after its passage by an act which went into effect, by virtue of an emergency clause, June 22, 1893, and that when the head camp met at Madison it was governed by the last mentioned act.

The act of June 22d, was a general act to provide for the organization and management of fraternal beneficiary societies. It did not specially repeal the amendatory act of June 19th, but had in it a general repealing clause repealing all acts inconsistent with it. At the same session the general assembly passed an act to provide for the organization and operation of corporations for the purpose of furnishing life and accident insurance upon the assessment plan, which went into effect July 1, 1893, and which contained a general repealing section.

If it be considered that section 18a was repealed by the emergency act of June 22d, or the joint operation of that act and the one which went into effect July 1st, such conclusion must be reached upon the ground solely that the repeal was by implication. Repeals by implication are not favored in this State, and a statute should not be held to be so repealed if it can be reasonably avoided. *Hyde Park v. Oakwood Cem. Ass'n*, 119 Ill. 149; *Butz v. Kerr*, 123 Ill. 659. Unless it is manifest that a repeal was intended by the legislature the former act should be considered in force. In regard to the acts under consideration, we have reached the conclusion that instead of an intent to repeal being manifest the contrary was intended, so far at least, as appertains to fraternal societies. While in section 28 of the act which went into effect July 1, 1893, there was a general repealing clause applying to all acts in conflict with that law and a specific repeal of the act of June 16, 1887, there was also contained in it this proviso:

"Provided, that the repeal of said act and nothing herein contained shall affect secret or fraternal corporations, associations or societies organized under said act or the act of which it is an amendment, but the same shall be and remain in full force as to them."

Without elaborating further we are constrained to hold that neither of the acts, separately or jointly, repealed section 18a so far as fraternal societies were concerned, and that the head camp had the power at its session at Madison to provide for the removal of its chief offices in this State. We are of the opinion, also, that the steps there taken and those subsequently taken by the board of directors were authorized and regular.

With this view it is needless to consider in this opinion the other points of contention presented in the briefs of counsel.

The decree of the Circuit Court finding for appellees and dismissing the bill will be affirmed.

CRABTREE, J., dissents.

Lyman Sanderson et al. v. Norman G. Snow.

1. FRAUDULENT CONVEYANCES—*Security Debts will be Protected Against.*—A security can not make a voluntary conveyance of all his property without consideration and leave a security debt unprovided for although the principal be able at the time to pay the debt; and such a conveyance will in law be regarded as fraudulent and will be set aside by a court of chancery upon the application of the party aggrieved.

2. JUDGMENTS—*Collateral Attack upon, under Creditor's Bill.*—The judgment in the original suit can not be attacked under a creditor's bill to enforce it, on the ground that there was no binding obligation existing at the time of the rendition of the judgment. The existence of such obligation will be conclusively presumed as against grantees of the judgment debtor.

3. ERROR—*Who May Complain.*—Part of the defendants in a suit can not assign for error the rendition of a judgment for costs against the estate of another defendant, to be paid in due course of administration, on the ground that the personal representative of such defendant was not a party to the suit.

Creditor's Bill.—Appeal from Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the December term, A. D. 1896. Affirmed. Opinion filed January 18, 1897.

R. D. McDONALD, attorney for appellants.

DUNCAN, HASKINS & PANNECK, attorneys for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

The appellee, Norman G. Snow, filed a bill in the nature of a creditor's bill, for the purpose of removing certain conveyances of real estate from Lyman Sanderson, Sr., to appellants, Lyman Sanderson, Jr., and Winfield Sanderson, out of the way of appellees' writ of *feri facias*, issued on a judgment of appellee against the said Lyman Sanderson, Sr.

The averments in the bill were, in substance, that appellee, on the 12th of November, 1894, recovered judgment against Hiram Holmes and Lyman Sanderson, Sr., in the County Court of La Salle County, for \$843 and costs of suit. That execution had issued on said judgment on March 9, 1895, and that the execution was still in the hands of the sheriff.

That previous to the rendition of said judgment, Lyman Sanderson, Sr., was the owner of certain real estate described in the bill.

That prior to the rendition of the judgment, to wit, March 18, A. D. 1891, and after the indebtedness on which the same was rendered had accrued, the said Lyman Sanderson, Sr., conveyed all said real estate to Lyman Sanderson, Jr., and Winfield Sanderson, for a pretended consideration of \$2; that the conveyance was not real but was intended to defraud appellee and other creditors of said grantor, and that said appellants held said real estate in trust for Lyman Sanderson, Sr., for the purpose of preventing a levy on same; that said Lyman Sanderson, Sr., had no other property liable to execution; that Hiram Holmes, the other defendant in the execution, was insolvent, and had no property liable to execution. The bill prayed for the setting aside of the said conveyance and that appellee be authorized to proceed in his execution, or other to be issued, and that the sheriff be directed to levy on said real estate and sell it to satisfy that judgment and costs, and for general relief.

The respondents, Lyman Sanderson, Sr., Lyman Sanderson, Jr., and Winfield Sanderson answered, calling on appellee for proof of the allegations of the bill except they denied the conveyance was fraudulent or that Lyman Sanderson, Jr., and Winfield Sanderson held the said real estate in trust for said Lyman Sanderson, Sr., or that the conveyance was made for the purpose of hindering and delaying the creditors of Lyman Sanderson, Sr., and called for proof as to the insolvency of Holmes.

The said appellees, grantees in the deed, set up in their answer that they were innocent purchasers of the land in good faith for the sum of \$3,000, mortgages on said land and debts of the said Lyman Sanderson, Sr., which they assumed and agreed to pay in consideration of the conveyance to them.

That the note on which the judgment was rendered became due June 12, 1890, and from that day till the first day of January, 1895, the said Holmes was solvent, and, appellees claim, could have been made out of him by the use of proper diligence. And that Lyman Sanderson, Sr., their grandfather, signed the said note only as security for said Holmes.

The cause was referred to the master, who filed his report making special findings sustaining the main allegations of the bill. Appellants carried the exceptions made before the master and by him overruled, to the Circuit Court. Thereupon appellee amended his bill in such manner as to charge legal fraud, so called, instead of actual fraud, on the part of Lyman Sanderson, Sr., in making the conveyance complained of, and adding other real estate as having been conveyed, and charging that Lyman Sanderson, Sr., had conveyed from himself all the real estate he then owned, and that he had no personal estate. In the meantime Lyman Sanderson, Sr., had died, being quite an old man, and the court ordered that the answers to the original bill, filed by Lyman Sanderson, Jr., and Winfield Sanderson, stand as answers to the bill as amended; to this order there appeared no objection at the time.

The court thereupon rendered a decree that the deed of

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March 18, 1891, of Lyman Sanderson, Sr., to his grandsons, appellants, be set aside and vacated and declared null and void, and of no effect whatever, as against the complainant, and after giving appellants, Lyman Sanderson, Jr., and Winfield Sanderson ten days in which to pay said judgment, interests and costs, authorized the appellee to proceed on his execution then issued, or on another to be issued, and sell said real estate to satisfy said judgment and costs, and that the costs of the suit be paid out of the estate of Lyman Sanderson, Sr., in due course of administration.

The master's report, among other things, showed that the consideration for the conveyance by Lyman Sanderson, Sr., to his grandsons, the appellants, was wholly voluntary and without consideration except a secret trust in favor of Lyman Sanderson, Sr., to the effect that the said grantees were to pay the grantor an annuity of \$300 per year during the grantor's life, payable quarterly on the first day of January, April, July and October of each year, and also to support and furnish him with board and lodging for and during his natural life, and to give him, which was conveyed, free of rent a certain ten acres of the property deeded, which agreement was in writing executed by appellants, contemporaneously with the execution of the deed. Lyman Sanderson, Jr., testified he was to pay all the debts which deceased owed, for which he had received value, which would not amount to over \$3,500, most of it being in mortgages on the land conveyed. The real estate conveyed was worth \$20,000, as shown by the evidence.

There is little or no dispute as to the evidence or as to the correctness of the master's report. It appears from the master's report that Lyman Sanderson, Sr., was security on the Holmes note to appellee, and that he was never asked for the money until about 1894, when Holmes became insolvent, and that Holmes had kept the interest on the note paid up to and including 1893, and to October, 1894; the note bearing date June 12, 1889, for \$800, at eight per cent interest, due one year after date.

The objections made to the decree are either technical or unsubstantial, and without merit.

It is insisted that inasmuch as Holmes was solvent at the time the conveyance from Lyman Sanderson, Sr., was made in and by which he conveyed his entire property to appellants, and rendered himself insolvent and unable to pay his debts, the conveyance was not in fact or law fraudulent, because the argument is, that Holmes at the time was solvent and able to pay the note due appellee; and *Matthews et al. v. Jordan et al.*, 88 Ill. 602; *Bittinger v. Kasten et al.*, 111 Ill. 264; *Moritz v. Hoffman*, 35 Ill. 553, and *Van Wyck v. Seward*, 6 Paige, 64, are cited.

We do not understand that either of the above cases show or hold that a security may make a voluntary conveyance of all his property without consideration and leave a security debt unprovided for and himself with no means to satisfy his obligation, simply because the principal was able at the time to pay the debt.

This would be in effect to disregard his own obligation—one he had voluntarily entered into and agreed to fulfill. The joint maker of a note, though security for the principal maker, is, in law, as far as collection is concerned, a principal in relation to the payee.

If he desires the principal pushed to payment under the statute he must give notice in writing to the payee to sue the note, otherwise he will be held indefinitely, the same as the principal maker.

The cases above cited, put in a condition as to what is said about a surety having a right to convey his property by gift or even in trust for himself, that he must retain enough to pay his obligation, and this we understand without reference to the ability of the principal to pay the debt.

Therefore the question as to whether the appellants Sanderson and Sanderson are bound by the appellee's judgment or not is unimportant. The property conveyed to them is liable to its payment though they are not personally bound. The existence of the debt at the time of the judgment is conclusively presumed as against the grantees in the conveyance, appellants here. *Fitzpatrick v. Rutter*, 160 Ill. 282; *Davidson v. Burke*, 143 Ill. 139.

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Where there is a secret trust in favor of the grantor as a consideration of the conveyance, and in part a valuable consideration, and property is not retained by the grantor sufficient to satisfy his debts, the transaction will in law be regarded as fraudulent and a court of chancery will not enter upon the task of determining what part of the "consideration is money and other property, and what part is to be paid in the future support of the grantor," but will treat the conveyance as a nullity "between the grantee and the creditors and hold the property liable for their claims." *Moore v. Wood*, 100 Ill. 451; *Gordon v. Reynolds*, 114 Ill. 118.

There was no error committed in allowing the bill to be amended and the answer to stand to the amended bill.

The decree does not have the effect of setting aside the appellants' deed from Lyman Sanderson, Sr., except in aid of the executions mentioned in the bill and decree, and the decree is not against appellants, requiring them to pay the judgment, only that the lands may be sold under the executions in case appellants do not pay it.

There was no error of which appellants can complain in decreeing costs against Lyman Sanderson, Sr.'s, estate. Whether the administrator, not being a party, is bound or not, is no concern of the appellants, and they are not in any way injured. The costs might have been properly charged to them or made a lien on the land, but no cross-error is assigned by appellee in that particular, and can not be considered here.

There appears no substantial reason for the reversal of the decree. It is therefore affirmed.

Joel Stull and Louis Stull v. John S. Stull and H. A. Lambart.

1. *APPEALS—From Orders of a Probate Court.*—An appeal will not lie to the Appellate Court from an order of a County Court dismissing a petition to obtain the probate of a will and to compel its production for that purpose. Appeals in such cases should go to the Circuit Court.

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Stull v. Stull.

Petition, in probate. Appeal from the County Court of McHenry County; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the December term, 1896. Appeal dismissed. Opinion filed January 6, 1897.

A. B. COON and C. P. BARNES, attorneys for appellants.

C. A. ALLEN and D. T. SMILEY, attorneys for appellees.

PER CURIAM.

The appellants, Joel Stull, Adell Curtis and Louis Stull, filed a petition under Sec. 12, Chap. 148, R. S., entitled Wills, requesting a citation to issue to John S. Stull and H. A. Lambart, appellees, to show cause why they should not file the will of Lefler Stull, deceased, in their possession or control, with the clerk of the Probate Court, and for general relief.

The petition and affidavit showed that appellees were residents of Nebraska county, Nebraska; that at the time of the death of Lefler Stull said deceased was a resident of said McHenry county, Illinois, but temporarily residing with his son, John S. Stull, in Auburn, Nebraska county, Nebraska, was *non compos mentis*, and was induced by said John S. Stull to execute a will in said Nebraska county; that he owned no property of any kind in said State of Nebraska, but owned real estate in said McHenry county, Illinois, and that John S. Stull had the will in his possession or else had placed the same in control of appellee Lambart, in said Nebraska county, Nebraska, with a view of having the will probated in McHenry county. This citation was asked. The citation was issued as requested, by the clerk of said County Court of McHenry County, May 22, 1896, returnable June, 1896, and was returned by the sheriff not served. On the 6th of July, 1896, the appellees entered their appearance limited to the motion made, and moved the court to dismiss the petition and quash the citation on grounds appearing on the face of the petition.

The petition was amended praying for the probate of the will when produced, or a copy thereof. August 10, 1896, appellees renewed their motion to dismiss.

The motion was sustained by the court, and the petition and citation was dismissed by it. Thereupon Adell Curtis, one of the petitioners, prayed and was allowed by the court an appeal to the Circuit Court of said county, and the other two prayed for and were allowed an appeal to this court.

Appellees moved this court for dismissal of said appeal for the want of jurisdiction.

After due consideration, we have determined that the said motion ought to be sustained, and hold that such appeal is allowed only to the Circuit Court from such an order as this.

By Sec. 14, Chap. 148, R. S., entitled Wills, appeals are allowed from the County Court to the Circuit Court, from the order of the County Court allowing or disallowing any will to probate.

It was held in *Lynn v. Lynn*, 160 Ill. 314, that, under Sec. 88 of the Practice Act, and Sec. 8 of the Appellate Court Act, when construed together, "which must be done, the Appellate Court is clothed with jurisdiction of appeals from or writs of error to, final judgments or decrees of * * * County Courts, etc., in all criminal cases below the grade of felony, and all suits or proceedings at law or in chancery, except in cases where a franchise or freehold is involved," etc.

In *Union Trust Co. v. Trumbull*, 137 Ill. 146, the Supreme Court held that Sec. 8 of the Appellate Court Act repealed by implication Sec. 122 of the County Court Act, in so far as it conflicted with it, and we presume the rule would apply to Sec. 14, above cited, in case of conflict.

In *Lee v. The People*, 140 Ill. 536, it was held, that an appeal from a bastardy proceeding lies directly to the Appellate Court, on the ground that, while it was not a suit at common law, yet "it was a proceeding at law."

It has also been held that proceedings under the insolvent debtor's act and by administrators in County Court for order to sell lands to pay debts, where a freehold is not involved, are appealable to the Appellate Court, under the designation of chancery proceedings.

In *Green v. Cable*, 159 Ill. 29, it was held, that an appeal was allowable to the Circuit Court from an order of the County Court allowing a claim of a creditor of the estate against the estate.

We are of the opinion that Sec. 8 of the Appellate Court Act was not intended to repeal Sec. 14 of Chap. 148, entitled Wills, and does not necessarily conflict with orders made in County Court, in strictly probate matters.

The proceeding in question was not a proceeding in law or chancery, nor a criminal proceeding.

It was a proceeding to obtain the probate of a will, and to compel its production with that view, and was appealable to the Circuit Court from an order of the County Court dismissing it.

The court, in substance, by the order of dismissal, refused to hear the case or to probate the will, or order its production. The other questions raised in the case are not before us, as we have no jurisdiction of the appeal.

The appeal of appellants is therefore dismissed.

Amos Boyce v. Lillie Stull.

1. *APPEALS—From Orders of a Probate Court.*—An appeal will not lie to the Appellate Court from an order of a County Court, dismissing a petition for letters of administration. Appeals in such cases should go to the Circuit Court.

Petition, in probate. Appeal from the County Court of McHenry County; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the December term, 1896. Appeal dismissed. Opinion filed January 7, 1897.

A. B. COON and C. P. BARNES, attorneys for appellant.

C. A. ALLEN and D. T. SMILEY, attorneys for Lillie Stull.

PER CURIAM.

This is an appeal from an order of the County Court of McHenry County, dismissing the petition of appellant,

Hamilton v. Andrews.

Amos Boyce, for letters of administration upon the estate of Lefler Stull, deceased, who is alleged to have departed this life at Auburn, Nebraska county, Nebraska, on April 9, 1896, leaving no property in that State, but being the owner of real estate in this State. The petition showed that petitioner was a creditor to the amount of \$65, and upon a hearing the court ordered that unless this claim of \$65, and costs of \$1, should be paid by the parties interested, letters of administration should be issued as prayed. Thereupon one Lillie Stull tendered the appellant \$66, which he refused to accept upon the ground that she was not one of the parties interested. Upon this refusal the court entered an order dismissing the petition, and appellant excepted and appealed to this court.

The point is made here that the appeal should have been taken to the Circuit Court and not to this court. We think the point is well taken, for the reason set forth in our opinion, filed at this term, in the case of Joel Stull et al. v. John S. Stull et al., and which we deem it unnecessary to here again repeat. Appeal dismissed.

Jane Hamilton v. Charles H. Andrews.

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1. RULES OF COURT—*Must be Obeyed*.—A judgment will be reversed for a failure of the defendant to file briefs as required by the rules of court.

Scire Facias, to revive a judgment. Error to the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the December term, 1896. Reversed and remanded. Opinion filed January 22, 1897.

STEPHEN R. MOORE, attorney for plaintiff in error.

No appearance for defendant in error.

PER CURIAM.

The defendant in error has failed to file briefs in this case as required by the rules of this court, within the time prescribed. The judgment of the Circuit Court is therefore reversed under rule No. 27 of this court, and cause remanded.

Woelfel Leather Company v. Thomas Thomas.

1. EVIDENCE—*Proof of Previous Accidents to Show Condition of Machinery.*—In a suit for damages for personal injuries based on the alleged defective condition of a safety appliance on an elevator, it is error to admit proof of a previous accident where there is no evidence to show that it was in consequence of any defect in the safety appliance.

2. SAME—*Tests of Machinery.*—In a suit for damages for personal injuries, based on the alleged defective condition of a safety appliance on an elevator, it is error to exclude the evidence of experts as to the condition of the safety appliance, at the time of a test made shortly after the accident, where the evidence showed that the appliance was then in the same condition as at the time of the accident.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Grundy County; the Hon. GEORGE W. STIPP, Judge, presiding. Heard in this court at the December term, 1896. Reversed and remanded. Opinion filed December 17, 1896.

S. C. STOUGH and A. R. JORDAN, attorneys for appellant.

E. L. CLOVER and C. F. HANSON, attorneys for appellee.

PER CURIAM.

This was an action on the case brought by appellee against appellant to recover damages for injuries alleged to have been sustained by him, while in its service, as a common laborer in a tannery at Morris, in said Grundy county, on August 12, 1895. The declaration contained four counts, but upon the trial, there being no evidence to sustain a recovery under the first and second, as to those counts the court directed a verdict for defendant, and as appellee makes no complaint as to this action of the court, it is unnecessary to consider whether it was proper or not. The third count in substance alleged that on August 12, 1895, appellant was possessed of and using a certain building as a tannery; that appellee was employed therein as a common laborer; that there was in said building a certain elevator used for the purpose of conveying employes and freight from one floor

to another in the building; that it was the duty of defendant to have and keep said elevator in a reasonably safe condition for use by its servants; that defendant neglected such duty, in this: that the dogs provided for the purpose of stopping and holding said elevator in case the same should fall, were not of sufficient strength to hold said elevator, whereby said elevator became and was dangerous and unsafe to those who were upon the same; that while said elevator was being operated by the defendant, it suddenly and without warning started to descend while plaintiff was upon it, while in the discharge of his duty, and said dogs, by reason of their unsafe condition, were unable to hold said elevator, in consequence of which the elevator fell with the plaintiff a great distance, causing his injury.

The fourth count is similar to the third, except that it alleges that the dogs attached to the elevator for the purpose of stopping the same, in case of its suddenly falling, were so improperly placed that they were incapable of stopping or holding the elevator, whereby it was in an unsafe and dangerous condition for those who were upon the same; and the allegations as to the accident and injury were the same as in the third count.

On the day of the accident appellee and one O'Donnell, a fellow-servant, had just placed a "horse leather" upon the elevator for the purpose of moving it to another floor, when it suddenly started downward and went to the basement floor, upon striking which, the machinery seems to have been reversed automatically, when the elevator started up again, and then the wire cable broke and fell, and appellee was injured, not by the cable, but by the fall of the elevator.

We do not find in the record any evidence showing the improper construction of the elevator, nor of its safety device, nor of the improper attachment of the dogs. Nor is there any evidence, beyond the mere fact that the elevator fell and the safety dogs did not catch and hold it, that they were in an improper or unsafe condition. There is evidence tending to show that these dogs are not expected

or intended to operate, except in case the cable breaks, or other accident happens whereby the elevator is set free to fall.

The wire cable which operates the elevator, runs upon pulleys, two loose and one tight pulley, and to raise or lower the elevator the cable is shifted from one pulley to the other as may be required. The evidence tends to show that if the cable is not properly or fully shifted from one pulley to the other, the elevator may go down suddenly, and yet the cable be tight enough to prevent the dogs from being released sufficiently to take hold and stop it. Appellant's theory is that O'Donnell, who was working with appellee, carelessly operated the elevator, whereby it fell and caused the injury. We think the evidence is clear that the cable did not break until the elevator had fallen to the basement, and started upward again, but there is no satisfactory proof as to how or why it so suddenly started on its descent.

Witnesses were allowed to testify, over the objection of appellant, that some years before the accident to appellee, this same elevator fell from the top floor to the basement, with the men who were then upon it. We think this was error. The occurrence was too remote in time, and there is nothing to show that it was in consequence of any defect in the dogs or safety device. So far as the evidence shows, the accident occurred through the improper operation of the elevator by one Becker, on one of the lower floors of the building. Under the circumstances of this case the admission of this evidence was erroneous and prejudicial to appellant.

There was some evidence on the part of appellant that about three days after the accident to appellee, a new cable was put in and the elevator tested to see whether the dogs worked properly or not. There was also proof that after the new cable was put in the dogs were in the same condition they were at the time of the accident. Other evidence of like character was offered as to the test, and the fact that the dogs worked properly and stopped the elevator as they

Woelfel Leather Co. v. Thomas.

were designed to do, but this evidence was rejected by the court, although the witnesses, some of them at least, appear to have been experts and competent to testify on that point. In this we think there was also prejudicial error. In the state of the evidence under the pleadings in the case, it was all important to appellant to be permitted to prove that the accident did not occur from the causes alleged in the third and fourth counts of the declaration. The evidence offered tended to prove the dogs, or safety device, were in proper condition for stopping the elevator on the day of the accident, and we think it should have been admitted. We see nothing to show that the putting in of the new cable affected the injury in one way or the other.

We see no serious objection to the court's action on the instructions, but for the errors indicated the judgment will be reversed and the cause remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1896.

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Samuel J. Howe v. Grant Forman.

1. **APPEALS—When They May Be Dismissed.**—A motion to dismiss an appeal improperly taken, may be allowed before the term to which the appeal would take the case.

2. **APPEAL BONDS—Can Not Be Amended by Filing Bond of Another Party.**—Section 69 of the practice act, providing for the amendment of informal and insufficient appeal bonds, applies only “to the party taking such appeal,” and does not authorize the filing of a bond by a party to the suit, who did not join in the appeal.

Motion, to dismiss an appeal. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1896. Appeal dismissed. Opinion filed December 18, 1896.

SAMUEL J. HOWE, *pro se*.

JOHN C. WILSON, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

October 6, 1896, the Circuit Court, upon motion of the appellee, appointed a receiver of the property and effects of the appellant and one George C. Mastin, and in the same record entry rendered judgment against them for \$307.46 in favor of the appellee.

The appellant and Mastin prayed an appeal, which was “allowed upon their filing their bond,” etc.

Cline v. Richards.

November 5, 1896, the appellant alone filed an appeal bond, reciting an appeal by him, "impleaded with George C. Mastin," from the judgment only, and on the same day filed the transcript of the record here.

By operation of law, that appeal is to the next term of this court.

In *Reynolds v. Perry*, 11 Ill. 534, the Supreme Court held that a motion to dismiss an appeal "improvidently granted," might be granted before the term to which the appeal would take the case.

That the case is not properly here upon a bond by the appellant only, is conceded. *Hileman v. Beale*, 115 Ill. 355, is in point; but the appellant asks leave to file a bond here, in accordance with the order granting the appeal—relying upon section 69 of the practice act. *Tedrick v. Wells*, 152 Ill. 214, decides that where an appeal is granted to a nominal plaintiff, suing for the benefit of others, a bond given by the persons for whose benefit the suit was prosecuted, would not bring up his appeal, so that he might be in court upon a bond to be given by him, under the section cited.

The defect here is the same in principle.

Mastin has taken "no appeal, and made no attempt to do so," as was said by Judge Baker there of *Tedrick*. The appeal is not from the order appointing the receiver; had it been, the question would have been different. *John F. Alles Plumbing Co. v. Alles*, 67 Ill. App. 252.

The motion of the appellee to dismiss the appeal is granted, and the appeal dismissed.

[NOTE.—Since this case was decided, the Supreme Court decided *Hammond v. People*, 164 Ill. 455, on which this court acted in *Kelley v. Leith*, April 15, 1897.]

George T. Cline v. John E. Richards et al., Executors, etc.

1. **LACHES**—*When a Bar to Relief*.—A and B entered into a contract in 1868 concerning a sale of land belonging to A, and the land was conveyed in pursuance of such contract in 1870. A died in 1881 and in 1893 his executors filed a bill against B for an accounting, alleging fraud.

The evidence showed that A had knowledge of the transactions of B with the land, and yet, having such knowledge during all the remaining years of his life, he did nothing. The court decided that he must be held to have acquiesced in such transactions, and that such acquiescence bound his executors.

2. FRAUD—*Notice of—Laches.*—A and B entered into a contract in 1868 concerning a sale of land belonging to A; in 1870 C filed a bill against A and B to enforce performance of a contract concerning the land made between B and C, and, later in the same year, this suit was dismissed and the land was conveyed by A to C. A died in 1881 and in 1893 his executors filed a bill against B for an accounting, alleging fraud. *Held*, that the knowledge that A had of the pendency of C's suit bound him with knowledge of what the suit was about, or at least bound him to inquire concerning it, and that, if he chose to go on and perform the contract entered into with B, his executors could not, after the lapse of so long a time, obtain an accounting from B on account of transactions between B and C, of which the suit of C gave him notice.

Bill, for an accounting. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1896. Reversed with directions. Opinion filed December 28, 1896.

JOHN C. PATTERSON, attorney for appellant.

JAMES D. ANDREWS, GEORGE M. MILLER and ARTHUR L. GETTYS, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellees, as executors of the last will and testament of David G. Evans, deceased, late of Logan county, exhibited their bill in equity against the appellant, the main object of which was to compel an account by the appellant concerning a certain transaction had between the appellant and appellee's testator in regard to an eighty-acre tract of land situated in Cook county, and obtained a decree *in personam* against the appellant for \$18,465.65, from which this appeal is prosecuted.

Appellee's testator died in April, 1881, and the original bill herein was filed February 23, 1893. A general demurrer to the original bill was confessed, and the amended bill was filed April 29, 1893.

The contract out of which the controversy has arisen was as follows:

“Contract between George T. Cline and David G. Evans:

In consideration of one dollar in hand paid to me by George T. Cline, of the city of Chicago, county of Cook, and State of Illinois, I do hereby agree, and do hereby grant him exclusive privilege and right to purchase of me, and I do hereby sell said Cline the following described property, to-wit: The W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 32, in township 39, range 13 east of the third principal meridian, lying and situated in Cook county, Illinois, by said Cline or any person he may sell said land to, for \$10,000, payments to be made as follows: \$2,500 cash, \$2,500 in one year, \$2,500 in two years, and \$2,500 in three years, with interest at ten per cent per annum, to be paid on or before the 1st day of January, 1869. If said Cline can sell or negotiate said property to any person, to any and all amounts over and above \$10,000, I do hereby agree to pay him as commission for negotiating sale for me for the property, as the payments are made to me under this agreement.

In witness I have hereto set my hand and seal, this 31st day of October, 1868.

DAVID G. EVANS,
GEORGE T. CLINE.

I have left with said George T. Cline a deed for the conveyance of said property, for him to fill in any name who may purchase the within described land on the terms specified in this agreement, said deed being acknowledged at Lincoln, Logan county, Illinois, the 28th of October, 1868. Consideration of said deed being \$12,000; said Cline or any purchaser he may find, to give me a good and sufficient mortgage for the securing of the payments as herein stated. If said sale is not consummated or made by January 1, 1869, said Cline agrees to return said deed and all papers connected with said described land.

DAVID G. EVANS,
GEORGE T. CLINE.”

It may be mentioned, incidentally, that the land described in the contract had been purchased by Evans in 1861, and that Cline in the matter of such purchase acted in some respects, at least, as the agent of Evans, and the evidence furnishes considerable presumption that from the time of the purchase until the making of the above contract, Cline was the agent, in Chicago, of Evans, concerning the land; and it seems to have been established that Evans and Cline were distant relatives, and were, from the time of the purchase of the land until Evans' death, on friendly, if not intimate, terms.

The contract of October 31, 1868, seems to be plain enough, and there is no evidence that any fraud was practiced by Cline in the procurement of it, except such as the law might perhaps imply from the circumstance that he had, previous to its execution and delivery to him, authorized a sale of the property, through one Baldwin, to Samuel S. Greeley for \$12,000. The record discloses that said Baldwin did, under date of October 22, 1868, execute, in his own name, to Greeley a receipt in the nature of a contract for the sale of the land for said sum payable in installments, wherein it was recited that it was made under "the written authority given him (Baldwin) by George T. Cline * * * to sell as agent for the owner," the said eighty acres, for which tract Baldwin agreed to procure for Greeley, from the owners, a good and sufficient warranty deed, etc. The Baldwin-Greeley contract, although dated nine days before the Cline-Evans contract, was not recorded until November 2, 1868, and may not have been delivered until the date of its record. Greeley testified that he supposed he recorded it at once.

Whether Evans knew of the contract given to Greeley by Baldwin, or that such a contract was contemplated when he made the contract of October 31st, is not known. There might be some presumption indulged in that he did know of it, or had reason to make inquiry that would have developed it, from the fact that in the last paragraph of the contract he recites that he has delivered to Cline a deed of the prop-

erty, acknowledged three days before the date of the contract, expressing a consideration of \$12,000, the price Greeley was to pay, and had given Cline authority to fill in Cline's own name or the name of "any purchaser" he might find, as grantee, and "if said sale is not consummated or made by January 1, 1869," the deed should be returned.

We do not regard as being of much importance, except on the question of notice to Evans, the fact that controversies arose between Cline and Greeley, whereby the contract between Baldwin and Greeley was not carried out, nor the further fact that Greeley subsequently purchased the premises for \$16,000, after he had failed in, or abandoned, a suit for specific performance begun by him. Such circumstances have but little, if any, bearing upon the relative rights of the parties to this suit, except in so far as they tend to establish that Evans had knowledge or notice of what Cline had done.

Evans was a party defendant to the bill for specific performance brought by Greeley, and appeared by solicitor in the suit.

The solicitor testifies that he was employed by Cline to defend the suit for Evans and did so, and that he saw Evans once during the pendency of the suit, and had a conversation with him concerning the suit, but was not permitted to testify to the conversation. He also identified a letter that was written by him to Evans, and although the date of the letter is not shown by the record, it is manifest from its contents that it was written while the suit was pending. Appellant's brief mentions May 28, 1870, as its date, and it is quite certain from Cline's letter to Evans on June 4, 1870, that Evans received it before that letter was written.

The letter, so far as it is shown by either the transcript or the abstract, was as follows:

"MR. D. G. EVANS: Mr. Greeley can not come to time and therefore the sale of your land to him has fallen through. When the offer of \$15,000 was made, there was a party who stood ready to advance him the necessary funds; when a new arrangement was made on basis of \$16,000, this party

withdrew, and Mr. Greeley hoped to carry it through. I tendered him the deed, and this day his counsel was obliged to confess Greeley could not complete. I am of the opinion that it will pay you to hold on to the land, as in time it will be worth much more than \$200 an acre.

There is an injunction against you staying the sale and incumbrance of the land, but it can be dissolved. They still cling to the idea that you can be made to come under the contract made by Cline of \$12,000. This is folly. Now, my fee of \$500 must be paid, and you will at once send me that amount. Cline wrote me when he visited you that you was ready at any time to send me that amount, and now I wish it. I send an affidavit for you to swear to, which you will do and return at once in order that I may move at once and dissolve the injunction. Your property will sell, no doubt, in time, for \$200 to \$500 an acre, although it will not bring it now. This suit must be got out of the way in order to clear the title, as it prevents any transfer by you. My fees are due, and, before moving further, I wish my money, when I shall at once proceed. I have done a great deal in the case, and have a right to call for my \$500. It will pay you to clear the suit out of the way and hold your land. It is a dull time now."

Greeley's suit for specific performance of the Baldwin contract was begun February 12, 1896, and was dismissed October 15, 1870. Greeley testified that the litigation culminated in a settlement in which he agreed to pay \$16,000 for the land, instead of \$12,000, as agreed with Baldwin.

Just when the settlement took place is not certain, but probably it culminated in July, 1870, for on the fourteenth day of that month, Greeley filed for record a warranty deed, dated May 5, 1870, from Evans to himself, of the premises, for an expressed consideration of \$16,000, and on the same day trust deeds from him to Cline were recorded to secure \$12,250, presumably a part of the purchase price.

The uncertainty of much that is in evidence concerning transactions prior to the great fire of October, 1871, in Chicago, is due to the circumstance that most of the docu-

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mentary evidence that once existed in relation thereto, excepting such letters and papers as Evans had at his home, were destroyed in that conflagration; and the testimony of witnesses a quarter of a century later was, necessarily, faulty in many respects.

The deed from Evans to Greeley, in pursuance of the settlement that had been arrived at, was sent by Cline to Evans for execution under cover of a letter dated May 8, 1870, as follows:

"I here inclose the deed to be acknowledged, as I mentioned when I last saw you. Consideration I have \$16,000 in deed; whether I may get it or not is the question; one-fifth cash, balance, one, two, three and four years, notes at seven per cent. I have strived hard to make sale, and will perhaps get one-half of the amount over \$10,000. My partner, Phelps, has worked vigorously since I left last fall to make the sale to his friends, and I think has succeeded at last. You can acknowledge before county clerk at Springfield, as the party says he would rather have it done at the capitol. It makes no difference, I suppose; anything to please him, as he says it may give a better tone to the matter. The two deeds are all the same as you sent two years ago this fall. I will give them to you when you come here, or will send them to you by express, as you wish. Tell the madam to send me a sample of dress pattern, so that I may know the kind she wishes. Will send it by express to Elkhart. Be sure and acknowledge deed; send on as soon as possible, as the party may back out."

That letter of May 8th was followed by two letters from Cline to Evans, dated respectively, June 3, and June 4, 1870, which, with the inclosure for \$7,500, were as follows:

Cline to Evans, June 3, 1870: "Yours received; in answer will state, the party I contracted with backed out, and in order to get the land cheaper, commenced suit against you and me. This old Baldwin is at the bottom of it, to make something out of you and me. Keep cool, do not give yourself any uneasiness and pay no \$500 or nothing. I will be responsible for the sale; they can not

scare me nor you neither; sign nothing until I tell you what to do. I thought I had the matter closed, and you would have had the money by this time. I will send you the obligation at once. Answer no letters to lawyers. I told them I would not pay him until all was fixed, and not \$500. He thought you would get scared and send the money. I paid him \$250. He is to fix up all this. Baldwin has bothered me much in the sale of the land. Answer no letters. Will write you again. You are all safe.

P. S. I will send you the agreement of my own and all will be right. Do not be any way alarmed, as I will bring all right. All this is gotten up by old Baldwin, the man who wanted you to join in the ditching and draining. I give him a contract for commissions which he did not fulfill, and I signed a paper. He commenced suit to make money out of you and me, but I will beat him; only keep cool and say nothing about it, as it is humbug.

I here inclose my obligations, which will be paid when due, and do not mention to any one but that you own the land yet, and you really do until paid for, as it still stands in your name on the record, as I wish it to stand until I sell it."

Cline to Evans, June 4, 1870: "I just received your letter last night on my return from Clark Station, and wrote you a few hurried lines in relation to the lawyer claiming \$500 for fees. I told him I would not pay over \$250. He took the privilege to write to you, supposing he might get it. They commenced suit against me about a year ago, and made you a party to the suit. This they can do, whether right or wrong, but they know they can't do anything; they only want to extort money out of us.

I will here explain the whole matter. Last spring two years ago, I gave to old Baldwin an agreement to sell the land for \$12,000; \$3,000 cash, balance in one, two and three years, interest at six per cent. During the fall of 1868 he brought a man around who offered a check of \$3,000 provided I would give him the deed and take mortgage for balance. I told them to take the check to the

bank, and bring me the money, then I would give the deed. They did not come around for about a month after, and said, unless I would give them the deed for the same they offered, they would commence suit against the owner; and again, in the meantime I had made a contract with a man named Phelps, thinking that they had entirely backed out, but Phelps goes on and negotiates with another party for \$14,000. After waiting a long time for the party to make the first payment he finally backed out. After the extension of the city limits, Baldwin and Greeley raised the \$3,000, and tendered the money. I told them that I would not take less than \$16,000, one fifth cash, balance in four years, interest at six per cent.

This they agreed to come up to, but finally backed out; still they did not discharge the suit, which suit does not amount to anything. I would have told you about it when there, but thought it of no consequence. I wish you would send me the affidavit Bellows sent you; also the letter, and if they do not take the land, I will instruct you what to do, and if necessary will send you the necessary affidavit to swear to; but Bellows tells me this morning he thinks they will take it on the terms they agreed upon; the trouble is, they can't raise the money, and if they do not soon, we will dissolve the injunction and throw them into the costs. You will have nothing to pay. I shall worry them out, and we will get all we can for the land, whether it is worth it or not. Give yourself no trouble about it, you are all safe; but you can help me out by saying, if required, you gave me the land to sell only during the month of May, 1868. As there is no one here knows anything about our arrangement, and as things are at present I do not wish them to know on any account, which would be a detriment to me in the suit, and it is highly necessary for you to know this part. Answer no letters in relation to the sale of the land to Bellows or any one else. I will work it all square if you will only stand by me. Until I make sale there is no necessity of your being here, even if the suit should go on; keep quiet and say nothing about the matter to any one, as I

mean to get all it is worth, and more if possible. These sharks here are not going to beat me very much, I will assure you, and I can't trust any of them."

The obligation referred to was as follows:

"Know all men by these presents that I, Geo. T. Cline, am justly indebted to David G. Evans for the sum of \$7,500, payments to be made as follows, to wit:

\$2,750.00..... July 1, 1870.

3,000.00..... " " 1871.

3,250.00..... " " 1872. Value received.

Witness my hand the 4th day of June, 1870."

We might quote many more letters, and recite many more circumstances, tending to show that Evans never claimed his probable right to terminate the contract he made with Cline on October 31, 1868, but on the contrary extended it and acted under it as being binding upon him up to the very last; that he always treated Cline as his debtor, and not Greeley; that he knew, or was bound with knowledge that Cline had sold the land for \$16,000, and never claimed, as being his due or right, any more than the \$10,000 mentioned in his contract with Cline.

It is quite certain that before Cline gave to Evans his obligation of June 4, 1870, to pay \$7,500, with interest added in, all but that part of the \$10,000 had been paid by Cline, and the inference is strong that from henceforward Evans never claimed any more from Cline than the amount of that obligation and interest.

It will be seen that \$2,750 of that obligation was payable July 1, 1870. On the twenty-first of July, 1870, Cline wrote Evans requesting a modification of the obligation to the extent of extending the dates of payment at ten per cent interest, and there is nothing to show that Evans refused to assent to the extension.

Subsequent letters show that Cline sent to Evans in August, 1870, \$1,500, in June, 1871, \$2,500, and a claim March 4, 1872, that he had paid \$500 besides, concerning all three of which payments Cline wrote Evans March 4, 1872, and asks for verification, because his books had been burned in the

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fire. Again, there was found among Evans' papers a receipt to Cline for \$1,500, under date of June 28, 1872, "as part payment for land purchased from me and situated"—describing the eighty acres. Letters of May 23, 1873, June 9, 1873, and June 17, 1875, show further payments by Cline aggregating \$2,425.

We do not intend to be understood as saying that the letters of Cline to Evans exhibit straight-forwardness of dealing with, or representation to, Evans, but we quote and refer to them mainly for the purpose of showing, in part, the evidences that Evans had knowledge, or might have had knowledge by the exercise of such reasonable diligence as every ordinarily prudent man is chargeable with, of the entire situation, and that he was not imposed upon except by way of a tax upon his good nature and friendship.

It seems to us clear enough that Evans never departed from his intention, as expressed in the contract of October 31, 1868, to, as between himself and Cline, treat Cline as the purchaser of the land and as his debtor for it, at the price of \$10,000, leaving to Cline all that he might make above that figure. It should be borne in mind that Cline was held to be incompetent as a witness to most matters in controversy, and that because of the destruction by fire of all his papers pertaining to the transactions that were had before October, 1871, and of the loss or destruction of his papers concerning subsequent transactions, when he removed to Maryland in 1883, his defense, so far as was permitted to him, was mainly confined to Evans' papers produced by the appellees.

It was offered to be proved by Cline that he and Evans had a final settlement in 1877 at the Tremont House, in Chicago, when, in consideration of a payment of about \$800, made by Cline to Evans at that time, Evans gave Cline a receipt in full, which was lost when Cline removed to Maryland in 1883.

Now, if Evans had knowledge, as we think he did, of all of Cline's transactions with the land, and if such transactions might, for any reason known to him, have been

avoided by Evans, or he might have required Cline to account to him, yet having such knowledge during all the remaining years of his life, down to 1883, and doing nothing, he must be held to have acquiesced in them, even though he should not be held under the evidence to have expressly ratified them.

What bound Evans has necessarily bound his executors, the appellees, unless something to avoid the effect of such conclusion has come to the knowledge of the executors that Evans was not informed concerning.

All such matters as are relied upon to avoid such effect upon the executors, were facts which Evans was informed of, or put upon such inquiry concerning as was equivalent to knowledge, by the suit for specific performance begun by Greeley against him and Cline, and by the letters of his solicitor and Cline.

It would not have been permitted to Evans, if he had lived to the time when this suit was begun, to have avoided a plea of *laches* by saying that he did not know that Cline had previously sold the land for more than the price mentioned in the contract of October 31, 1868.

The knowledge that Evans acquired of the pendency of Greeley's suit for specific performance, bound him with knowledge of what the suit was about, or, at least, bound him to inquire concerning it, and if, having such knowledge and failing to inquire further, he chose, as he clearly did, to go on and perform under the contract he entered into with Cline, his executors can not, any more than he could, at this great lapse of time, come into equity and obtain an accounting from Cline for all that he obtained from Greeley.

The doctrine of *laches* has especial application to the case, but we do not need to cite authorities.

The decree is reversed, with directions to the Circuit Court to dismiss appellees' bill.

III. Commercial Men's Ass'n v. Wahl.

Illinois Commercial Men's Association v. Mary Wahl.

1. **INSURANCE—Notice of Assessments.**—A suit against a mutual insurance association was defended on the ground that the deceased was not at the time of his death a member of the association in good standing. The evidence showed that the constitution of the association required thirty days notice to a member of an assessment; that at a meeting of the board of directors of the association a resolution for an assessment upon each member to be paid within three days was passed; that an assessment was made on the 2d of October, and notice of the same sent to the deceased; that the thirty days allowed for the payment thereof expired in November (exact date not shown), and that the deceased died on November 6th, without having paid said assessment. *Held*, that the resolution of the directors was void and that deceased was not shown to be delinquent upon the assessment made October 2d, due on some unnamed day in November.

Assumpsit, on an insurance policy. Appeal from the Superior Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

D. V. SAMUELS, attorney for appellant.

M. SALOMON, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This action is by the widow of John Wahl to recover upon a certificate of membership in the appellant association. What were the terms of the certificate is not shown, but the defense below was, and appeal here is, upon two grounds:

First, that John Wahl was not, at the time of his death, a member in good standing of the association.

Second, that at the time of his death he was "under the influence of intoxicating liquors," which, by the constitution, barred all claim.

The first ground is based upon the fact that, at a meeting of the board of directors, September 28, 1893, a resolution was passed for an assessment of \$3 upon each member, to

be paid on or before October 1, 1893. That resolution, requiring payment in three days, was void, as the constitution required thirty days notice to a member, of an assessment. The brief of the appellant recites this resolution as requiring payment on or before November 1, 1893, but both the record and the abstract contradict that recital.

It is only for failure to pay that assessment, of which there is no evidence that John Wahl ever had notice, that the appellant insists that John Wahl was not a member in good standing at the time of his death.

The abstract does state that the secretary and treasurer of the association testified that "an assessment was made on the 2d day of October, and the thirty days allowed for the payment of the same expired in November. Notice of this assessment was sent to John Wahl. It was not paid by him or any one else before his death." But as he died November 6, 1893, such testimony does not tend to show that he was delinquent upon an assessment which expired on some unnamed day in that month.

The second ground is on a fact which the court, in accordance with the great preponderance of the evidence, found against the appellant.

Whatever may be the real merits in this case, the judgment for the appellee can not, on this record, be disturbed, and it is affirmed.

**Gustav Schoeneman, Impleaded, etc., v. Henry F.
Martyn et al.**

1. OFFICIAL BONDS—*Cover Future Transactions Only.*—An official bond, which, after reciting the election of the officer, and when his term of office will begin, and that "by reason whereof divers sums of money will come into his hands," provides that he should pay over all money which shall at any time come into his hands as such officer, covers future transactions only, and its recitals have reference only to moneys coming into his hands subsequent to the execution of the bond.

Schoeneman v. Martyn.

Debt, on an official bond. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed January 21, 1897.

STATEMENT OF THE CASE.

This action was upon the bond of a treasurer of appellee's lodge, to recover money which he, it is claimed, should have paid over to his successor in office on proper demand. He served for two consecutive terms, succeeding himself, his last term being from July 13, 1893, to January 13, 1894.

G. Schoeneman, the appellant in this case, is one of the sureties on his bond, and the only one of the defendants who pleaded; the other surety and the principal on the bond are in default.

Schoeneman pleaded *non est factum, nul tiel corporation*, and a plea of performance.

The third plea sets out performance of each requirement of the bond, and ends by saying that "Rosenberger did not violate the condition of the bond during his last term," and that "since the making of the said bond the plaintiffs have not in any way been damaged by reason of any breach of any matter or thing in said condition mentioned."

J. HENRY KRAFT, attorney for appellant, Schoeneman.

C. E. & G. D. ANTHONY, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Whether the third plea was technically good or not, need not be discussed. Appellee was bound to prove a failure to comply with the conditions of the bond.

The condition of the bond upon which this suit was brought is as follows:

"Whereas, the said Gus. Rosenberger has been elected master of exchequer of the said America Lodge No. 333 for the term commencing on the first day of July, A. D. 1893, and ending on the first day of January, A. D.

1894, or until the installation of his successor in office, by reason whereof divers sums of money, bonds, choses in action, chattels and other property belonging to said lodge No. 333 will come into his hands.

Now, therefore, the condition of the above obligation is such, that if the said Gus. Rosenberger, master of exchequer, shall keep a regular and correct account of all moneys received by him as master of exchequer, and pay out the same, or any portion thereof, under the proper order of said lodge No. 333, and not otherwise; and shall safely keep, and upon the expiration of his term of office, and whenever by said lodge No. 333 required, shall render unto said lodge No. 333 a just and true account of all such sum or sums of money, bonds, choses in action, chattels and other property, as shall at any time have come into his hands, charge or possession as master of exchequer of said lodge No. 333; and shall, at the expiration of his term of office, pay and deliver over to his successor in office upon demand of him made by his successor or by said lodge No. 333, all such balances or sums of money, bonds, choses in action, chattels and other property, which shall at any time have come into his hands, possession or control, as master of exchequer of said lodge No. 333, and if the said Gus. Rosenberger, master of exchequer, shall faithfully perform and do all other acts required of him to be done or performed by the constitution and by-laws of said lodge No. 333; and in case of failure of said Gus. Rosenberger to faithfully perform all the duties aforesaid, all necessary court costs, expenses, and a reasonable attorney's fee to be fixed by the court, shall be taxed against said Gus. Rosenberger, and for the payment of which this obligation is further charged; and if the said Gus. Rosenberger, master of exchequer, shall not wrong said lodge No. 333, to the value of anything, nor take part or share directly or indirectly in any illegal distribution of the funds or other property of said lodge No. 333, but shall, to the best of his ability, endeavor to prevent any such perversion of lodge property, and shall in all things well and truly, honestly and

faithfully, perform all and singular his duties as master of exchequer of said lodge No. 333, during his continuance in said office, then the above obligation to be void, otherwise to remain in full force and virtue."

Upon the trial the following stipulation was made:

"It is hereby stipulated that the minute book offered in evidence shows that Gus. Rosenberger, treasurer of said lodge, served as master of exchequer or treasurer for two consecutive terms, and each term was regularly elected and installed in office, and that all requirements provided for the election and installation in office of said treasurer, as laid down in the constitution and by-laws, were complied with.

That at the close of said Rosenberger's first term of office as treasurer, his books and accounts were regularly audited by an auditing committee duly appointed, and the books and accounts of said Rosenberger were found to be correct, and said books showed that he should have had a balance of \$564.72 on hand, which report was duly presented to the lodge and adopted.

That before Rosenberger entered on his second term, he presented his bond to the trustees, dated July 13, 1893, and the said trustees approved the same and reported to the lodge their approval, and the lodge adopted the report of the trustees and accepted said bond.

That after the bond had thus been approved and accepted said Rosenberger was duly installed in office as his own successor; that during his second term of office, from June 6, 1893, to January 4, 1894, said Rosenberger received \$356.25 and dispersed regularly \$367.60, leaving him chargeable with \$553.37.

That at the close of Rosenberger's second term the books were audited and found correct, leaving him chargeable with \$553.37; that the report was presented to the lodge and adopted."

It is further stipulated that the minutes show the amount received each meeting night and the amount expended, and the accounts are always balanced, the following form being used: "Amount on hand in the hands of the master of ex-

chequer at last meeting" (so much), "amount received" (so much), "total \$.....," "amount disbursed" (so much), "balance on hand in master of exchequer" (so much). It is also stipulated that at the close of Rosenberger's term the minutes show a balance of \$553.57.

The treasurer testified that at the commencement of his last term he did not have any money belonging to the lodge in his possession. An objection to this testimony was sustained, and the court refused to permit appellant to show that the treasurer, at the expiration of his first term, had spent all of the apparent balance on hand, and was then a defaulter to the extent of the entire amount which should have been on hand, and that nothing was received during his second term from transactions of the first term.

The latest utterance of the Supreme Court touching the question here presented, is in *Stern et al. v. The People*, 96 Ill. 475. Following this, we must hold that the bond covers future transactions only. The condition, after reciting his election, and when his term will begin, says: "By reason whereof divers sums of money will come into his hands." Its language is "shall" pay over all money, "which shall at any time have come into his hands as master of exchequer."

The recitals show this to have reference only to what should come into his hands subsequent to the giving of the bond.

All that came into his hands after the bond was given, has been paid over. What was not in his hands when the bond was given and never thereafter came, the bond does not cover.

The jury should not have been instructed to find for appellee, and appellant should have been permitted to show the actual state of the treasury when the bond was given. *Stern et al. v. The People*, 96 Ill. 475; *Inhabitants of Rochester v. Randall et al.*, 105 Mass. 295; *The County of Mahaska v. Ingalls*, 16 Ia. 81.

In the case at bar, the treasurer made no report at the end of his first term. A committee examined his books, and reported that he should have on hand some \$564.77.

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When shown this report the treasurer said that "he was satisfied the record was a correct statement of the condition of his books," or, as one witness testified, "After the books were all balanced, I said, 'That is the balance on the books as balanced,' and he said, 'Well, that is correct,' some words to that effect."

The judgment of the Superior Court is reversed and the cause remanded.

Peter Fox v. The Chicago & South Side Rapid Transit R. R. Co.

1. **EXPERT TESTIMONY—As to Values of Real Estate.**—Testimony as to the value of real property, and what damage is done to it by the construction of a railroad, is almost entirely a matter of opinion about which the judgment of competent men will, to some extent, vary, and as to which the opinion of experts is admissible.

Trespass on the Case.—Damages to real property by the construction of a railroad. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

STATEMENT OF THE CASE.

This was a suit in case brought by the appellant, Peter Fox, against the appellee to recover for alleged damages to certain real estate situated at the southwest corner of 63d street and Grace avenue, in the city of Chicago.

The property was said to have been damaged by the construction and operation of an elevated railroad by the appellee in 63d street immediately in front of the property aforesaid.

There is a single count in the declaration which avers, *inter alia*, "that by reason of the construction and operation of the said elevated road egress and ingress to plaintiff's property has been rendered difficult and dangerous, and his use of 63d street damaged and destroyed, and plaintiff has

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lost thereby the ordinary uses of said street; that defendant has stopped and run backward and forward these trains and engines with great noise of whistles blowing, bells ringing, escaping steam, grinding and rumbling of wheels by plaintiff's property, by means of which plaintiff's property is damaged and destroyed; by means of the several premises plaintiff's property, rents and improvements have and will be damaged in amount \$75,000."

Witnesses for both plaintiff and defendant were permitted to testify to their opinion as to the past, present and future value of appellant's property, and the effect upon the value thereof of the railroad constructed by appellee.

Defendant filed a plea of general issue. The cause was tried before a jury, the verdict being not guilty.

DOUTHART & GARVY, attorneys for appellant.

WALKER, JUDD & HAWLEY and EDWARD C. NICHOLS, attorneys for appellee; WILLIAM W. GURLEY, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant says:

"I. The judgment is contrary to the law and evidence.

II. The court below admitted improper evidence on behalf of appellee and over the objection of appellant.

III. The court below excluded proper evidence offered by appellant.

IV. The court below erred in giving to the jury the ten instructions, and each of them, on behalf of appellee."

As only the second is argued, the others, it is presumed, are abandoned.

Testimony as to what the value of real property has been, is, and will be, and what damage, if any, is done to it by the construction of a railroad, is, in the nature of the case, almost entirely a matter of opinion, about which the judgment of competent men will, to some extent, vary.

As to these matters, the opinion of experts is admissible.

Donnelley v. Packer.

Ottawa Gas Light & Coke Co. v. Graham, 35 Ill. 346; Johnson v. Freeport and Miss. Ry. Co., 111 Ill. 413; Galena & Southern Wisconsin R. R. Co. v. Haslam, 73 Ill. 494; Lovell v. Drainage District, 159 Ill. 188; Spear v. Drainage Commissioners, 113 Ill. 632; Green v. City of Chicago, 97 Ill. 371; L. B. & M. R. Co. v. Winslow, 66 Ill. 221; C. P. & St. L. Ry. Co. v. Nix, 137 Ill. 143; Metropolitan & W. S. Elevated Ry. Co. v. Dickinson, 161 Ill. 22.

The evidence was such that we do not think that the judgment should be reversed.

The judgment of the Circuit Court is affirmed.

Reuben H. Donnelley v. Charles P. Packer.

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1. TRIALS—*By the Court, Conclusive.*—When a controversy is submitted to the court for trial without a jury, a finding upon conflicting evidence will be final.

Assumpsit, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

MCCLELLAN & LITTLE, attorneys for appellant.

CLIFFORD & MORE, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

What does appear, and all that appears with certainty in this case, that is material, is that the appellee sued upon a note made by the appellant, payable to his own order, six months after date, for \$5,000, and indorsed by him, which note was in the possession of the appellee. All the quarrel between the parties is upon the subject of who ought to have paid that note, the appellant or the appellee.

The court has made a finding upon conflicting evidence, and that finding must stand. The judgment is affirmed.

MR. JUSTICE GARY ON PETITION FOR REHEARING.

This petition says: "It is not apparent from the opinion of the court that the grounds relied upon by the appellant for reversal, received such apprehensive attention of the court as to duly impress the court with their actual force and merit."

The attention of the court was directed to the undisputed facts that, first, the original \$5,000 represented by the note in controversy was borrowed by the father of the appellant, for the use of a corporation in which the father was interested, from an outsider upon collateral belonging to the appellee and lent for that purpose to the father; second, that the loan was paid by a check of the corporation upon a bank of which the appellee was president; third, that on four-fifths of this same collateral the note in suit was given to raise money to make good that check. Thus it appears that in the original transaction the appellee was accommodating the father of the appellant, and that if the appellee has taken up the note in suit to save his collateral, of which his possession of the note is presumptive evidence, he is \$5,000 out of pocket in the course of the business.

Now, whether in the various transactions which followed, and upon which the appellant and his father on the one side, and the appellee on the other, were, as witnesses, in conflict, the one side or the other told the truth, was a question upon which the finding of the court below is final, notwithstanding the attempted impeachment of the appellee as a witness. *White v. Clayes*, 32 Ill. 325; *Wood v. Price*, 46 Ill. 435; *Weaver v. Crocker*, 49 Ill. 461; *Schultz v. Babcock*, 64 Ill. App. 199, and scores of other cases.

The effort to impeach him was, in effect, an acknowledgment that if he was a truth-telling witness, he was entitled to recover.

The petition is denied.

C. E. Dorn and Gay Dorn v. James Clancy & Son.

1. RULES OF COURT—*Must be Complied With.*—Unless the rules are complied with, the court can not inquire into the merits of the case.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

CHARLES PICKLER, attorney for appellants.

WILLIAM A. DOYLE, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case comes here on an original record, which—upon proceedings here, which it is not necessary to detail—was admitted to be, in part, no record, and upon three supplemental records, to which there is no allusion in the abstract. Unless we disregard rules of this court, which we must enforce impartially or not at all, we can not inquire as to the merits of the case. *Thompson v. Economy Furniture Company*, 64 Ill. App. 140.

The judgment is affirmed.

Anne Bates v. Harvey H. Bates.

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1. DIVORCE—*Custody of Children.*—Under section 18, chapter 40, R. S., entitled "Divorce," the Circuit Courts have power to decree that an unsuccessful defendant may have the custody of a child a portion of the time. Such an order is experimental and if it should prove unwise it may be vacated at any time.

Bill for Divorce.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1896.

L. H. BISBEE, attorney for appellant.

KAVANAGH & O'DONNELL, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

October 21, 1895, the appellant obtained in the Circuit Court a decree of divorce from the appellee. The bill had been taken as confessed, and the hearing was *ex parte*. The custody of their then five year old boy was awarded to her. Neither of the parties have any other home than with their respective and respected parents.

June 10, 1896, on the petition of the appellee, the court ordered that the appellee might have the custody of the boy from five P. M. of Friday, to five P. M. of Saturday, in each week. From that order is this appeal.

Such an order was within the jurisdiction of the court. Sec. 18, Ch. 40, R. S., Divorce. We can not say that it is unwise. It should be the endeavor of the appellant and her friends to foster in the child natural affection for his father. If they will do so, and the appellee reciprocate, who can tell but happy results may follow? These parties are yet young.

If experiment shall prove that the order should not be continued, it may be vacated at any time. In its nature it is temporary, and is affirmed.

Martha Berry v. The People ex rel.

1. CONTEMPT OF COURT—*Record Must Sustain the Conviction.*—When the record does not sustain the conviction, it must be reversed.

Contempt Proceedings.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Reversed. WATERMAN, J., dissenting. Opinion filed January 21, 1897.

C. A. SURINE, attorney for appellant.

No appearance for appellee.

Angus v. J. B. Sullivan & Bro.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

July 2, 1896, Sage filed a bill against the appellant for a specific performance of an agreement for a lease for a term of two years from April 20, 1896, at a rent of fifty dollars per year, and obtained an injunction to restrain her from interfering with his possession, etc. Very shortly, under the direction of her husband, the house was torn down, and—so far as appears before us—with no participation in, or knowledge or ratification of, the act by her.

Nevertheless she has been fined \$50 for contempt of court in committing a breach of the injunction. If we have the whole case, she is wronged. There is no appearance by the appellee, and we reverse the order imposing the fine.

The costs here are adjudged against the relator, at whose instance the order was made.

WATERMAN, J., dissents.

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166s 461

John Angus and George A. Gindele v. J. B. Sullivan & Bro.

1. **SHORT CAUSE CALENDAR—*Sufficient Affidavit.***—The following affidavit, "William C. Malley being first duly sworn, on oath deposes and says that he is the duly authorized agent in this behalf, of the plaintiff in the above entitled cause, and that he verily believes the trial of the above entitled cause will not occupy more than one hour's time," is sufficient under the short cause calendar act.

Assumpsit, on promissory notes. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

STATEMENT OF THE CASE.

This cause was placed upon the short cause calendar under notice given upon the following affidavit :

"William C. Malley, being first duly sworn, on oath

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deposes and says that he is the duly authorized agent in this behalf, of the plaintiff in the above entitled cause, and that he verily believes the trial of the above entitled cause will not occupy more than one hour's time.

WILLIAM C. MALLEY."

A motion to strike the cause from such calendar having been denied, a trial was had, with the result of a finding and judgment for appellee, from which judgment appellant has appealed, and urges that the affidavit was insufficient to justify the placing of the cause upon the short cause calendar.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellants.

No appearance for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Our action must be governed by the case of *Angus v. Orr & Lockett Co.*, 64 Ill. App. 378.

The judgment of the Circuit Court is affirmed.

J. E. Thompson v. J. A. Porter et al.

1. APPELLATE COURT PRACTICE—*Abstracts and Bills of Exceptions.*—An Appellate Court will not review a verdict unless the bill of exceptions purports to contain all the evidence; the same principle applies to an abstract, for the court will not look beyond it to the record for missing evidence.

2. SAME—*Appellee's Brief.*—The appellee in his brief may insist upon the insufficiency of the abstract.

Replevin.—Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

GEORGE W. WOODBURY, attorney for appellant.

MCGLOSSON & BEITLER, attorneys for appellees.

 Angus v. Chicago Trust and Savings Bank.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

As to the actual dispute between the parties to this suit, the abstract does not show that any other witness than the appellant himself testified upon the trial, and from that abstract his cross-examination is wholly omitted, the side paging showing that it occupies nine pages of the record.

The abstract shows that some twenty-five other pages of the record which, by what follows, must also contain testimony, are omitted, though a few sentences are put in as re-direct testimony of the appellant, which are clearly what he would not have said, as they make him call himself "a scoundrel."

The appellant now presents for consideration six of what he calls propositions of law, but which are really statements—which he desired the court to approve—of what the evidence proved; and also urges that "in the light of the law and the undisputed facts of the record," the appellant should have had a finding in his favor—the case having been tried by the court without a jury.

It has long been settled law that an Appellate Court will not review a verdict unless the bill of exceptions purports to contain all the evidence; the same principle applies to an abstract, for the court will not look beyond it to the record for missing evidence. The appellees in their brief insist upon the insufficiency of the abstract, citing among several cases, *Mallors v. Crane Elevator Co.*, 57 Ill. App. 283, but the appellant has not heeded the warning.

Under such circumstances we affirm judgments, and this is affirmed.

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170a	298

John Angus and George A. Gindele v. Chicago Trust and Savings Bank.

1. ACCORD AND SATISFACTION—*Sufficiency of Pleas of.*—A plea of accord and satisfaction which does not aver an acceptance in satisfaction of the debt is bad.

Assumpsit, on promissory notes. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellants.

JOHN G. HENDERSON, attorney for appellee; MOSES, PAM & KENNEDY, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellants upon promissory notes, about which there is no controversy, and recovered a judgment from which this appeal is taken.

The first point made is that a "motion to strike cause from short cause calendar, for the reason that the case had been previously stricken from the trial court's short cause calendar" was denied.

We have copied from the abstract all that it shows upon the subject, and it does not appear that, in fact, the case was, when the motion was made, or ever had been, upon any short cause calendar.

The defense was that the appellants had, while the suit was pending, given checks payable thereafter, upon an arrangement which Gindele, as a witness, described, says the abstract, as follows:

"I gave Mr. Tolman about eight or ten checks in payment of all that Angus & Gindele owed him, as in full settlement. He was to retain all the notes and pass them over as fast as we paid the checks. He was to retain the notes as collateral, and this suit was to stand until all the checks were paid. The checks were dated ahead from one month to six or seven months."

Default was made in paying the checks, after two or three had been paid, and then the pending suit was pressed to trial. Such testimony falls far short of proving that the appellee accepted the checks in satisfaction of the debt sued for. A plea of accord and satisfaction—the only plea adapted to such a defense—is bad if it do not aver accept-

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ance in satisfaction of the debt. *Drake v. Mitchell*, 3 East, 251.

It is clear from the testimony of the witness that the checks were given and received only as a mode of payment if the checks were punctually paid; thereby giving time to the appellants, but not discharging the action if a default in payment followed.

The judgment is affirmed.

Charlotte E. Dorn v. J. W. Voorhees, W. J. Neebes and Tyler & Hippach.

1. **CERTIFICATE OF EVIDENCE—*When Necessary.***—No certificate of evidence is necessary in a chancery cause, unless it be to preserve oral evidence introduced on the hearing.

Bill, to foreclose a trust deed. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

CHARLES PICKLER, attorney for appellant.

WEART & WEART, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

We have again to follow our numerous decisions, and affirm the decree appealed from because of a failure by appellant to show, in her abstract, anything from which we can see what her case is about.

Appellant assigns for error :

“ 1st. The court erred in refusing to sign and seal a certificate of evidence.

“ 2d. The court erred in entering a decree herein in favor of W. J. Neebes.”

Enough is shown by the abstract for us to know that a bill in equity to foreclose a trust deed was filed by John W. Voorhees against the appellant, W. J. Neebes, A. S. Tyler and L. A. Hippach, and that the default of the appellant was vacated and that she was permitted to appear and answer, but nothing else concerning the bill is shown, and no part of the answer of appellant appears.

We may, accordingly, say that the abstract fails to show that the appellant had any interest whatever in the suit, or that she has any standing here, or elsewhere, to complain of any decree that was entered therein.

The first assigned error is not well taken, if, as we conjecture was the case, there was a reference of the cause to a master and evidence taken by him (of which, however, not a word appears in the abstract), and such evidence was reported to the court.

No certificate of evidence in a chancery cause is ever necessary or proper, unless it be to preserve oral evidence introduced upon the hearing. There does not appear to have been any oral evidence taken before the court, and the master's report of what was taken before him, became, when filed in court, as much a part of the record as the pleadings or the decree itself, and needed no certificate of the chancellor. *Ferris v. McClure*, 40 Ill. 99; *Jackson v. Sackett*, 146 Ill. 646.

The second error assigned can not be passed upon for want of an abstract of either bill, answer or evidence heard by the master.

The last case in which this court has been required to affirm for want of a sufficient abstract, is *Snively v. Hettinger*, 67 Ill. App. 278, where reference is made to many decisions by this court and by the Supreme Court.

The decree of the Superior Court is affirmed.

**Orr, Saddler & Co. v. James H. Gilbert, Sheriff, and
Olaf Matson.**

1. **FRAUD AND DECEIT—*Sales of Personal Property—Possession.***—The policy of the law does not encourage the owner of personal property to sell it and continue in possession of it; possession being one of the strongest evidences of title to personal property.

2. **PERSONAL PROPERTY—*Apparent and Real Ownership—Possession.***—If the real ownership of personal property is suffered to be in one, and the apparent ownership in another person, the latter gains credit as owner, and is enabled to practice deceit upon mankind.

3. **PRACTICE—*Judgment for Want of a Replication.***—Judgment may be entered for a defendant for want of a replication taking issues upon his pleas.

4. **SALES—*To Corporation by Stockholders.***—A jury may properly find that a conveyance of personal property to a corporation by persons owning all the stock in such corporation where there is no change of possession, is but a mere subterfuge to enable them to practice deceit upon mankind.

Replevin.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

STATEMENT OF THE CASE.

On September 3, 1893, a replevin writ was issued in favor of Orr, Saddler & Co., a corporation, against James H. Gilbert, sheriff of Cook county, Illinois, and Olaf Matson, for a "stock of groceries, canned goods, coffees, teas, flour, wooden and yellow ware, the same being all the stock of merchandise contained in store room known as 6148 South Halsted street, Chicago, Cook county, Illinois, being the same property levied upon on the 28th day of August, 1893, by the said James H. Gilbert, sheriff of said county, and execution in favor of said Olaf Matson, and against Harry B. Orr and John B. Saddler."

The defendants pleaded:

1st. Denying that they took the goods and chattels described in the declaration.

2d. Denying that they wrongfully detained the goods

and chattels mentioned in the second count of the declaration.

3d. Asserting that the goods and chattels were the property of Harry B. Orr and John B. Saddler, and not of the plaintiff.

4th. That on August 25, 1893, Olaf Matson sued out of the Superior Court of Cook County a writ of *feri facias* against Harry B. Orr and John B. Saddler, directed to the sheriff of said Cook county, to collect from Harry B. Orr and John B. Saddler \$534.45 damages, and costs amounting to about \$66 and interest; and that the goods and property mentioned in the declaration were the property of Harry B. Orr and John B. Saddler.

To these pleas no replication was filed.

A final certificate of incorporation was offered and received in evidence on behalf of the plaintiff, from which it appears that this final certificate was dated October 14, 1892; that the name of the corporation was Orr, Saddler & Co.; the object was to carry on the retail grocery business; capital stock, \$2,500, divided into fifty shares, at \$50 each; that Harry B. Orr subscribed for twenty-five shares and John B. Saddler for twenty-five shares; and that said final certificate was duly recorded in the recorder's office of Cook county.

A bill of sale from H. B. Orr and J. B. Saddler was introduced. Plaintiff claimed that on the 20th of October, 1892, said Orr and Saddler conveyed by this bill of sale all the property then owned by them at 5148 S. Halsted street, which included the property in question, to the corporation of Orr, Saddler & Co., incorporated on the 14th day of October, 1892.

John B. Saddler, the only witness called by the plaintiff, testified that he was secretary of the Orr, Saddler & Co., incorporation in September, 1892, at 5148 South Halsted street, Chicago, and he identified the corporation papers; that he and Mr. Orr were managers of said corporation for two years after the 14th day of October, 1892, at which time the property was sold to the Englewood Grocery Co.

Orr, Saddler & Co. v. Gilbert.

On behalf of the defendants, Mr. Olaf Matson testified that Mr. Saddler told him in December, 1892, that he and Mr. Orr were the owners of the stock of goods in the store at 6148 South Halsted street.

A Mr. J. M. Gray, on behalf of the defendants, testified that Mr. J. B. Saddler told him in June, 1893, that he and Mr. Orr owned the stock of goods at 6148 Halsted street.

Whereupon Mr. Gilbert, attorney for defendants, remarked: "We will rest our case here." The court remarked: "Is there anything further?"

Mr. Gemmill, counsel for plaintiff, said: "I will be sworn as a witness for plaintiff in rebuttal."

"The Court: What is there to rebut?"

Mr. Gemmill: I know all about the organization of this company and its doing business, and can testify about it.

The Court: But there is nothing here to rebut.

Mr. Gemmill: Well, if that is the court's view of it I will not testify, and we will rest our case.

The Court: (Addressing Mr. Gilbert.) Do you think there is anything here to go to the jury?

Mr. Gilbert: I would like to have the jury pass upon the facts. I think if there is a question of fact here the jury should pass upon it; I would like to have the court examine this bill of sale. (Handing it up.)

The Court: Well, I will give you ten minutes each to speak to the jury.

Mr. Gemmill: If the court intends to let this case go to the jury, I insist on my right to testify on behalf of the plaintiff.

The Court: You rested your case.

Mr. Gemmill: I only rested it upon the suggestion of the court that there was nothing to go to the jury, and under the belief that the court intended to take the case from the jury.

The Court: Every lawyer must make his own case."

Whereupon counsel for plaintiff then and there duly moved the court to take the case from the jury; which motion the court then and there denied; to which ruling

the plaintiff then and there duly excepted; and the plaintiff then and there duly excepted to the ruling of the court, denying Mr. Gemmill's right to further testify.

The jury found the issues for the defendants, and for them the court gave judgment.

L. H. BISBEE, attorney for appellant.

GILBERT & GILBERT, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The jury might properly find, as it did, that the goods were the property of Orr and Saddler. In fact, if not technically so, under the undisputed evidence the goods actually belonged to Orr and Saddler; that is, according to their testimony, they belonged to a corporation of which they owned all the stock.

The jury might properly, as it did, find the conveyance to the corporation to be a mere subterfuge. Moreover, there was no change of possession; the goods remained where they were before the bill of sale was made, with the same custodians.

The policy of the law in this State does not encourage the owner of personal property to sell it and continue in possession of it, possession being one of the strongest evidences of title to personal property. If the real ownership is suffered to be in one and the apparent ownership in another, the latter gains credit as owner, and is enabled to practice deceit upon mankind. *Ticknor v. McClelland*, 84 Ill. 471; *Wood v. Loomis*, 21 Ill. App. 604; *Allen v. Carr*, 85 Ill. 388; *Thornton v. Davenport*, 1 Scam. 296; *Thompson v. Yeck*, 21 Ill. 73.

Judgment might have been entered for the defendants for want of a replication taking issue upon the defendant's pleas. *Lindsay v. Stout*, 59 Ill. 491; *Williams v. Boyden*, 33 Ill. App. 477.

It is urged that Mr. Gemmill, counsel for plaintiff, should

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have been permitted to testify in rebuttal. As the court remarked—what was there for him to rebut? The only evidence given by the defendants was as to certain declarations made by Messrs. Orr and Saddler. There was nothing tending to show that Mr. Gemmill was present when either of such declarations was made. Mr. Gemmill, from his statement, apparently wished to testify as to the organization of the corporation and its doing business; there was no dispute about this, and the defendants had given no evidence denying such organization, or that the company did business.

We do not think another jury would find otherwise than did the one to whom this cause was submitted.

The judgment of the Circuit Court is affirmed.

**John A. Slater et al., Impleaded with George B. Goodall,
v. George M. Clark & Co.**

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1. **PARTNERSHIP—*Joint Adventures*.**—Where a transaction is a mere device to obtain the benefits of a partnership, whatever the parties may call it, it will be construed to be a partnership, and the parties to it will be held liable upon its obligations.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

WHITEHEAD & STOKER, attorneys for appellants.

MATZ & FISHER, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

It will not be necessary to review the numerous objections made by the appellants in relation to the admission and rejection of testimony.

No doubt there were some irregularities in those matters,

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but on the whole case, the real transaction is involved in no mystery, and the facts are clear.

The appellants were a majority of the board of directors of the Northwestern Building and Loan Association, and formed some sort of association with each other, and in pursuance of the purposes of such association, executed a contract as follows:

"This agreement, made and entered into this first day of June, A. D. 1889, by and between George B. Goodall, party of the first part, and John H. Slater, Jacob A. Cost, Hannibal B. Briggs, Otis L. Beardsley, George D. Barrett, Edward J. Whitehead and William M. R. Vose, parties of the second part, all of the county of Cook, and State of Illinois.

Witnesseth: That, whereas, said party of the first part has contracted for the purchase of sub-lots one (1), two (2), three (3) and four (4), in Watson's subdivision of lots one (1), two (2) and three (3) in Dobbin's subdivision of the north one-half ($\frac{1}{2}$), southeast one-quarter (S. E. $\frac{1}{4}$), northeast one-quarter (N. E. $\frac{1}{4}$), section three (3), township thirty-eight (38) north, range fourteen (14) east of the third principal meridian (E. 3d P. M.) in Cook county, Illinois, and proposes to erect thereon a six story building divided into stores and flats, according to certain plans now being prepared by Architect Thomas.

And, whereas, the said parties of the second part desire to purchase the said premises when complete.

Now, therefore, the said party of the first part hereby, in consideration of one hundred dollars (\$100) and other good and valuable considerations, covenants and agrees with said parties of the second part that he will complete said building on or before the first day of April, A. D. 1890, in a workmanlike manner, and in accordance with said plans and specifications, with such modifications thereof or additions thereto as may be mutually agreed during the construction of said building, and that on the completion thereof, as soon thereafter as request is made, he will sell and convey the same to said parties of the second part, their

assigns, or any one to whom they may direct such conveyance to be made.

And said party of the first part further covenants and agrees that the consideration for such transfer shall be the actual cost of said building and lots. And it is mutually agreed that in determining the cost of said premises, the following items shall be considered :

1st. The cost of the land, all costs in connection with acquiring title thereto, together with interest on deferred payments, if any.

2d. The entire cost of building and plans.

3d. The cost of procuring and carrying all necessary loans for funds in purchase of land, labor and material.

4th. Insurance and taxes.

5th. The compensation of twenty dollars (\$20) per week to said Goodall for his services from the date of this agreement until the said building is complete, but not for a longer period than the 1st day of April, A. D. 1890.

And it is further mutually covenanted and agreed, that if said premises are sold by the said parties of the second part at a price above the cost of said premises, then said Goodall shall receive one-eighth ($\frac{1}{8}$) of the profit arising from such sale, and that the parties of the second part shall severally receive a like share. Or, if it shall be determined to organize a corporation under the laws of the State of Illinois, for the purpose of ownership of said premises by the parties hereto, then the total capital stock of such corporation shall not exceed the value of said premises and improvements thereon, and the said Goodall shall receive one-eighth ($\frac{1}{8}$) of such capital stock. And the parties of the second part shall severally receive the same proportion of the stock.

Said first party agrees to keep said premises fully insured, and also keep said parties of the second part advised of any contracts made by him, and of all obligations incurred which affect his financial condition, either in connection with this building or any other business; that he will present satisfactory evidence of payments made by him for labor and material; that he will prosecute the completion of said building as rapidly as possible and to the best of his

ability. This agreement shall be binding upon the heirs, executors, administrators and assigns of all the parties hereto.

Witness the hands and seals of the said parties, this 4th day of June, A. D. 1889.

GEORGE B. GOODALL,	[SEAL.]
JOHN J. SLATER,	[SEAL.]
J. A. COST,	[SEAL.]
HANNIBAL B. BRIGGS,	[SEAL.]
OTIS L. BEARDSLEY,	[SEAL.]
GEO. D. BARRETT,	[SEAL.]
EDWARD J. WHITEHEAD,	[SEAL.]
WILLIAM M. R. VOSE.	[SEAL.]”

It does not appear that the appellants made any writing among themselves, but it was part of their scheme that the most of the money needed to erect the building should be loaned to Goodall by the Building and Loan Association, and that the appellants, from their own funds, would put in about \$20,000—which in fact became about \$35,000—with which to pay to the Building and Loan Association the dues and interest accruing to the Building and Loan Association under the law of such corporations, and the contract of Goodall with the Building and Loan Association in this instance.

It was expected that a loan of \$75,000 would be sufficient, but as one of the appellants, as a witness, expressed it, “Goodall ran ahead so fast we couldn’t control him; he got away from us; we couldn’t control him,” and so the loans ran up to \$150,000. The appellants had “a committee to superintend Goodall, and see as to the construction of the building, and see that the cost of the building would not be unduly increased,” whose efforts seem to have been not entirely successful.

The appellee sued upon a promissory note, made by Goodall, as follows :

“ \$508.

CHICAGO, ILL., February 8, 1891.

Four (4) months after date, we promise to pay to the order of Geo. M. Clark & Co., five hundred and eight and 67-100 dollars, payable at 413½ Cottage Grove Ave., Chicago. Value received.

G. B. GOODALL & Co.”

West Chicago St. R. R. Co. v. McKeating.

The consideration of the notes was the unpaid part of the price of forty-four gas stoves put into the building, connected with gas, and used for cooking.

The name of George B. Goodall & Co. was adopted by Goodall for his bank account connected with the building at the suggestion of one of the appellants, who was cashier of the bank, to avoid confusing the building account with his other account.

We regard it to be quite immaterial whether the name of partnership could appropriately be applied to the connection between Goodall and the appellants. It was a joint adventure, to which the appellants furnished the needed funds, partly from their own pockets, and partly from the treasury of a corporation, which they, being a majority of the board of directors, could control; in which adventure the appellants and Goodall were to share equally in the hoped for profit. *Morse v. Richmond*, 97 Ill. 303.

Goodall was intrusted by the appellants with carrying out the adventure, except, as later, the appellants ineffectually tried to supervise his acts through a committee of themselves. Obligations he incurred to other parties in the execution of this joint adventure, are binding upon them all.

We take every fact in the case, except the note and its consideration, from the version given by the appellants.

The judgment that the appellee recovered is affirmed.

West Chicago St. R. R. Co. v. John McKeating.

68	437
107	406

1. **NEW TRIALS—*Misconduct of Counsel.***—Trial courts ought to visit the penalty of a new trial upon counsel who overstep the limits of fair argument, and all authority demands such a course as being the most effectual remedy in such matters.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed January 21, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

ROSS & TODD, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In this case the jury returned a verdict for \$10,000, from which the trial court required \$6,000 to be remitted, and judgment was entered for \$4,000.

The appellee was injured by being run upon and having his right leg broken by a cable car, operated by the appellant in a public street, at a time when he was about two years old.

At the time of the trial, which was about thirty-three months after the accident, the child's leg was well, so far as objective symptoms were shown, except, mainly, that it contained some scars on the lower part of the leg, that there was a slight turning inward of the foot, and a measurement around the calf of one-half inch less than the calf of the other leg.

That \$10,000 was an excessive award of damages under such circumstances, was conceded by the trial judge by requiring a remittitur of three-fifths of its amount as a condition to not granting a new trial, and by counsel for appellee by accepting such requirement.

Such a circumstance requires us to look closely to discover what is in the case that resulted in such a confessedly wrong verdict, and justified making good in part that which was admitted to be so flagrantly bad as a whole.

Aside from the proneness of juries to mulct corporations, enjoying public franchises, in heavy damages in personal injury cases, we find in the record extraordinarily unfair and improper appeals to the jury by counsel for appellee in his closing argument.

It may, probably, be presumed by us that, in part at least, because of such remarks, the trial court required a partial remittitur to be entered as a condition for not granting a

West Chicago St. R. R. Co. v. McKeating.

new trial. Condonation of such offenses in such a way, may, perhaps, sometimes be made with propriety, where counsel will not heed the admonitions of the court during the trial, but we are unwilling to set a precedent of approval upon such a course where court and counsel unite in agreeing that three-fifths of a verdict due to such causes, is bad.

We need not single out the objectionable remarks. To do so would add nothing to what is common knowledge with counsel, so learned and able as he who erred in this case. It is enough to say that in none of the numerous cases where this court has spoken upon the subject, and where other courts have likewise spoken, was there, so far as we recall, anything more likely to unduly inflame the passions of the jury against the defendant, than occurred in this instance.

If trial courts do not rebuke such conduct in a manner that will be heeded, as it is their duty and power to do, we must apply the corrective that is neglected by them.

In the recent case of N. C. St. R. R. Co. v. Leonard, 67 Ill. App. 603, we said that trial courts ought to visit the penalty of a new trial upon counsel who overstep the limits of fair argument. All authority demands such a course as being the most effectual remedy in such matters. We also indicated in that opinion that where it could be plainly seen from the record that an abuse of discretion in such regard had been committed, this court would reverse a judgment based upon a verdict obtained by illegitimate argument.

This court has lately, in W. C. St. R. R. Co. v. Krueger 67 Ill. App. 574, for the cause we have been speaking of, reversed a judgment for \$35,000, rendered upon a verdict for \$50,000, without permitting opportunity for a further remittitur here, and this judgment will, in accordance with that precedent, be reversed also, and the cause remanded.

MR. JUSTICE GARY.

The inflammatory remarks of counsel, followed by such a verdict, demonstrate that no cool, fair, impartial consid-

eration of the merits of the case was attempted by the jury, but that the verdict was a mere "whack" at the railroad.

The office of courts is to administer justice in accordance with "due process of law."

J. J. Russell v. Alice M. Lake.

68	440
109	612

1. PRACTICE—*Refusing to Admit Evidence—When Sufficient to Reverse the Judgment.*—Before a judgment can be reversed for rejecting evidence, the offer of the evidence must be so specific as to put the court in the wrong in refusing to admit it.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

M. V. GANNON, attorney for appellant.

R. GILRAY, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case got into the Circuit Court by appeal from a justice, but the abstract gives us no further information on that subject.

The appellee claimed from the appellant, as one of a firm, \$60 for wages. The only question argued in the brief of the appellant is upon the matter stated in the abstract, thus:

"Whereupon plaintiff closed his case, and the court refused to hear any evidence for the defense, and said that these orders having been obtained upon notice was *res adjudicata*; to which ruling of the court counsel for the defendant then and there duly excepted; which exception was overruled; upon which defendant offered to show that plaintiff was notified by defendant Russell of the termina-

King v. Rhoads & Ramsay Co.

tion of the agreement between the said parties, and of his purpose not to pay out any salary in her behalf; and said notification was given before any of the indebtedness in suit occurred; which offer was refused by the court; to which said refusal defendant, by his counsel, then and there duly excepted."

We need not consider whether the court was right or wrong upon the *res adjudicata*. Before a judgment can be reversed for rejecting evidence, the offer of the evidence must be so specific as to put the court in the wrong in refusing to admit it. What "parties" were referred to in the offer, is left to inference.

That is not enough. *Gaffield v. Scott*, 33 Ill. App. 317.

As the action of the court is not shown to have been erroneous, the reason assigned for such action is immaterial. *Hahn v. Gates*, 67 Ill. App. 596.

The judgment is affirmed.

**Mary King, Mary King Halsey and Fanny King, Ex'rs,
v. Rhoads & Ramsay Company.**

1. ACCOUNT STATED—*When Conclusive by Acquiescence*.—As between the parties, an account rendered and not objected to within a reasonable time, becomes a settled account which is conclusive as between the parties, unless some fraud, mistake, omission or inaccuracy is shown.

Claims in Probate.—Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed January, 21, 1897.

DOW, WALKER & WALKER, attorneys for appellants.

HOLLETT & TINSMAN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The Supreme Court, in 26 Ill. 390, and 50 Ill. 351, eulogized living lawyers; why may we not place here some

words of praise of one who, after forty years of faithful service at the bar of this county, and in courts out of it to which that service led him, rests from his labors? William H. King, for many years before his death, was one of the most prominent as well as one of the most successful of the lawyers of Chicago; and the gains attending that success were not dissipated by imprudence, but carefully accumulated into a considerable fortune left to his family.

Yet, in looking into the facts of this case, we must exclude our personal knowledge of the man, and decide only by what appears of record. The first thing that arrests attention is that by the account presented in the Probate Court, less than three months after his death, it would appear that the appellee had supplied him with coal from the last day of March, 1885, to October 4, 1889, to the amount of \$659.51, upon account of which all that the appellee ever received was \$21.75, in the fall of 1886. The generosity of sewing machine companies, in which Judge Walker disbelieved in *Lucas v. Campbell*, 88 Ill. 447, is niggardly beside that of such a coal dealer.

But the strangeness of the transaction is removed when we see by the record that March 30, 1889, a student in Mr. King's office found him with a coal bill purporting to come from the appellee, whose bill at that time amounted to \$459, less the credit of \$21.75, and that the student, by Mr. King's direction, then made out and delivered to the appellee a bill for legal services and costs paid for the appellee, amounting to \$768.40, and that thereafter, during that year, the appellee, as appears by its bill, supplied Mr. King with coal to the amount of \$200.51, with nothing paid on it. It is true that the bill rendered by Mr. King purported to be for services rendered and costs paid by his firm of King & Packard; but the usage of adjusting reciprocal accounts—partnership against individual and *vice versa*, is so frequent that it may well be looked to in explanation of transactions upon which death has set the seal of silence. It should have been held that upon these facts, without a word of explanation from any source, the parties had

North Chicago St. R. R. Co. v. Wiswell.

treated the coal bill which had then accrued as being extinguished by, and the residue as in satisfaction of, the bill for legal services and costs. True, acquiescence, when relied upon, must be proved, but the proof will vary in one case from that in another. No one could doubt the intention of Mr. King in sending his bill. The appellee had notice by the circumstances of what that intention was, and by October 4th, in the same year, had sent him thirty-one tons of coal, without, so far as appears, any demand or expectation of any money for it.

Mr. King lived more than two years after the last delivery of seven tons, October 4, 1889, and nothing was done by either party as to their accounts.

The appellee does not argue that the bill of Mr. King did not come to its possession, if it did so argue, the proof would rebut the argument.

The witness went to the office of the company and inquired for the gentleman who was, in fact, treasurer of the company, was sent to the back end of the office and was there met by a gentleman presenting himself as the individual sought for. *Edmanson v. Andrews*, 35 Ill. App. 223.

The court peremptorily instructed the jury to find for the appellee. The verdict should have been for the appellants.

The judgment, which is against the personal representatives of Mr. King, is reversed, and the cause remanded.

North Chicago St. R. R. Co. v. M. L. Wiswell.

1. INSTRUCTIONS—*Not to Usurp the Province of the Jury*.—An instruction which directs the jury in what order the questions in the case should be considered, is properly refused.

2. DAMAGES—\$5,000 *Held Excessive*.—A verdict for \$5,000, rendered in favor of a man sixty-seven years old for injuries (a broken leg) sustained by him while attempting to board a street car, is excessive.

68	443
108	613
68	443
105	169
68	443
112	1421

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Remittitur ordered, etc. Opinion filed January 21, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

JAMES B. McCracken and ALBERT M. CROSS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee has recovered a judgment for \$5,000 damages for injuries sustained by him in attempting to board a car of the appellant.

We can not know what is the truth of the case, and the verdict of the jury upon the conflicting evidence must stand so far as relates to the question of negligence.

The appellant complains of the refusal of two instructions, the first, in part, directing the jury in what order the questions in the case should be considered—a matter with which the court had nothing to do; and the second—as it is recited in the abstract—requires so much study to find out any meaning in it, that a jury could hardly have been enlightened by it. Altogether the appellant asked twenty-seven instructions, of which fourteen were given without modification, or with such only as is not complained of, except in striking out of one the direction as to the order of business, as before mentioned.

All the law of the case was given to the jury in varied phraseology.

The appellee was sixty-seven years old, and weighed two hundred and forty pounds. A younger and lighter man would soon have recovered from the broken leg, without permanent injury. Whatever may have lately grown to be the practice, five thousand dollars is not to be considered as the minimum of damages in actions against railways for negligence.

If within ten days the appellee remits one-half of the judgment, we will affirm the residue, otherwise the judgment will be reversed and the cause remanded.

William J. Moore v. Anson B. Jenks.

68a 445
173a 157

1. **PARTIES**—*Must be Interested in the Subject-matter.*—A person who has ceased to have an interest in real estate affected by a decree can not appeal therefrom.

Foreclosure Proceedings.—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

Dow, WALKER & WALKER, attorneys for appellant.

W. D. LAUNDER, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The complaint of the appellant is upon a decree of the court as to the relative rights of the appellant under a sale of real estate upon a judgment in his favor, and of the appellee under a mortgage upon the same premises, subsequent to the judgment.

But, as upon his own showing, it appears that more than eighteen months before the decree he had sold and assigned the certificate of the sale under his judgment, and had no longer any interest in the real estate affected, he has no ground of complaint against the decree. *Press v. Woodley*, 57 Ill. App. 123; S. C., 160 Ill. 433.

It is affirmed.

West Chicago St. R. R. Co. v. Marcus Fishman.

68b 445
169a 196

1. **VERDICTS**—*On Conflicting Evidence.*—Where there is abundant proof to warrant the finding of the jury, the verdict will not be disturbed, although the evidence is contradictory upon the questions at issue.

2. **DAMAGES**—*When Excessive*—*Action of the Trial Court.*—Where the trial court requires a remittitur as a condition for not awarding a

new trial, the Appellate Court will not feel justified in substituting its judgment for that of the trial judge, who heard the case, and, presumably, acted according to the best of his discretion.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

B. M. SHAFFNER, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant in case to recover for personal injuries to himself, and for damages to his cab and horse, driven by himself, by being run into and upset by one of appellant's cable trains at the intersection of Madison and La Salle streets, Chicago, in September, 1892. The jury returned a verdict in appellee's favor for \$3,500, from which appellee remitted \$1,000, and a judgment for \$2,500 was entered, and this appeal allowed therefrom.

Most of appellant's brief is devoted to an argument that the verdict was contrary to the evidence, in that the evidence disclosed a want of due care by the appellee for his own safety, and a lack of negligence by the appellant, through its servant, the gripman, who operated the train.

As is not unusual in cases of this character, there was contradictory evidence upon these questions, but there was abundant evidence to warrant the jury in finding against the appellant upon both of them, and we are not permitted to supplant the jury in the exercise of their functions under such circumstances.

There are no questions of law that need to be discussed. The mere statement of such as are mentioned in the brief, affords a sufficient answer to them, except as to the one that the court erred in not giving an offered instruction to

Ford v. Buckley.

find the defendant not guilty, and as to that one it is only necessary to refer to what we have already said concerning the evidence.

The complaint that the damages are excessive, must be met by saying that the trial court exercised its supervisory power over the verdict, by requiring a remittitur of one thousand dollars as a condition for not awarding a new trial, and while it might be that a still greater remittitur would have more nearly approximated exact justice, we do not feel justified, under all that the record shows, in substituting our judgment for that of the judge who heard the case, and, presumably, acted according to his best discretion. The judgment is affirmed.

J. Wilkes Ford v. Thomas Buckley.

1. MALICIOUS PROSECUTION—*What is a Justification.*—In actions for malicious prosecution, if the defendant had reasonable grounds of suspicion, supported by circumstances sufficient to warrant a cautious man in believing in the guilt of the plaintiff, such suspicion so supported and acted upon in good faith, is a complete justification for the prosecution.

Trespass on the Case, for malicious prosecution. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Reversed. Opinion filed January 21, 1897.

SAMSON & WILCOX, attorneys for appellant.

M. L. RAFTREE, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant for maliciously, and without probable cause, prosecuting the appellee upon a charge of embezzlement, from which the appellee was discharged by the justice of the peace before whom the charge was made.

We assume the innocence of the appellee, and that the motive of the appellant in making the charge was such as in law constitutes malice; but the proof is so clear that the appellant had probable cause to believe that the appellee was guilty, that the judgment can not stand. The appellee had been in the service of the appellant more than twenty years. He had received money to be paid to men, who told the appellant, and as witnesses testified, that they never received it, though the appellee reported that he had so paid it, and as a witness on the trial, persisted in that story. We can not go through the whole evidence, showing, among other things, a personal examination of books and witnesses by, and advice of, counsel, for the purpose of demonstrating the only reasonable conclusion, that the appellant had reasonable grounds of suspicion, supported by circumstances sufficient to warrant a cautious man in believing in the guilt of the appellee. Such suspicion, so supported and acted upon in good faith, is a complete justification; and it devolved upon the appellee to disprove it. *Epstein v. Berkowsky*, 64 Ill. App. 498.

The judgment is reversed and a finding of facts will be made as the reason for not remanding.

Charles Johnson et al. v. Anna Magnuson.

68	448
82	372
82	375
68	448
194	258

1. MASTER AND SERVANT—*Joint Liability*.—Under section 23, chapter 110, R. S., entitled "Practice," an action lies against a master and his servant jointly, for an injury sustained by reason of the negligence of the servant while in the course of his employment.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

HALLOWELL & LASLEY, attorneys for appellants.

SULLIVAN & McARDLE and WM. P. HAYS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee recovered a verdict and judgment for \$1,000 in an action of case brought by her against the appellants—a master and a servant—jointly, for being run over and injured by a horse and sleigh belonging to Johnson and driven by Anderson.

There was conflicting testimony whether the appellee was struck by the horse or sleigh of Johnson, or by a cutter then passing; but the verdict of the jury is final upon that question.

The point most earnestly pressed is, that the form of the action is wrong. The charge in the declaration is “that the defendants then and there so carelessly and negligently and improperly drove, governed, directed and managed said horse and sleigh,” etc.

Under the old forms, the master and the servant could not be sued jointly in one action of this kind, because against the master, the action must have been in case and against the servant in trespass. 1 Ch. Pl. 121, Ed. 1828.

But even then, against the master, the negligence might be stated as that of the master, without noticing the servant, though it was usual, and the more correct form, to state the negligence as that of the master by his servant. *Ibid.*, 341, 2 Ch. Pl. 574, Ed. 1883.

If, therefore, both of the appellants had been masters, whose servant drove, the declaration would have been proved by proving the negligence of such unmentioned servant.

Now the distinction between case and trespass has been abolished by statute. Sec. 22, Ch. 110, Practice. If both are liable, they are liable for the same act, and to the same extent for the actual damages sustained by the appellee, and as the form of action against either may be the same as against the other, the technical objection to joining them no longer exists. The old law, correctly laid down in *Parsons v. Winchell*, 5 Cush. 592, is not now applicable, and one of the reasons there given, viz., that after a recovery in such an action, and satisfaction of the execution by the master, he would not be entitled to reimbursement by the servant, never was the law. 4 Am. & Eng. Ency. of Law, 12.

No question is made about the amount of damages, but it is argued that "there is no evidence to show that Anderson (the servant) at the time was out on business for Johnson" (the master).

Johnson testified that he was, at the time of the accident, in the grocery business at 992 Sheffield avenue.

Anderson testified that he had an order to deliver, and described the route he was taking.

It was in express words admitted by the attorney of the appellants, on the trial, that the sleigh and horse were Johnson's, and that Anderson was his servant at the time of the accident.

It is clear that the sleigh was a grocer's delivery sleigh, and that Anderson was driving in the course of his employment and performance of his duty to Johnson.

The judgment is affirmed.

West Chicago Street Railway Company v. Jessie Krueger, by her Next Friend, Charles Krueger.

1. JURISDICTION—*Of Parties and Cause of Action Must Appear.—Must be Shown by Written Pleadings.*—In a court of record, the plaintiff for the validity of his judgment must see to it that the defendant is brought or comes into court, and that there are written pleadings showing a cause of action over which the court has jurisdiction. And unless such written pleadings be filed by the plaintiff, there is nothing for the defendant to answer, and he need not appear, because only upon such pleadings can a judgment be taken against him.

2. PRACTICE—*Effect of Failure to file Plea.*—Proceeding to trial as if an issue had been made up, when the defendant has failed to file a plea, is a waiver of a formal issue, and the irregularity will be cured by verdict.

3. TRIALS—*Improper Remarks by Counsel.*—Counsel should not be allowed to state to a jury, facts which have not been proven on the trial, and an attempt to do so should be stopped by the court without waiting to be called upon by the opposite party.

4. SAME—*Improper Remarks by Counsel—When Ground for Reversal.*—Where an examination of the record leads a court of appeal to the firm conviction that a very large and most unusual verdict was the re-

68	450
68	462
68	450
77	190
79	200
68	450
101	668

West Chicago St. Ry. Co. v. Krueger.

sult in some measure of inflammatory and improper remarks by counsel, the judgment rendered in pursuance of such verdict will be set aside.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed January 21, 1897.

STATEMENT OF THE CASE.

This was an action on behalf of Jessie Krueger, by her next friend, Charles Krueger, to recover damages for personal injuries sustained by reason of alleged negligence on the part of the West Chicago Street Railroad Company. The declaration, which consists of four counts, alleges that on June 27, 1892, while the plaintiff, who was then a child of about five years of age, was crossing Madison street, near its intersection with Sangamon street, in the city of Chicago, the defendant, by its servants, in control of a Madison street cable train, failed to give warning by the ringing of a bell, gong, or otherwise of the approach of the train; to run the train at a safe rate of speed; to make proper and efficient efforts to stop the train before it struck the plaintiff; to keep a proper watch or lookout for persons passing across the tracks. In consequence of which negligence it is alleged the plaintiff was struck by the car and wounded, so that it became necessary to amputate her left leg, and other parts of the body were so badly bruised that she became and has since remained sick and disordered; that as the direct result of the wounds so received, the plaintiff has suffered, and will hereafter suffer, severe and permanent bodily injury and mental torture; that she was permanently crippled, on account of which she will always be subject to extreme anguish of mind, and her matrimonial prospects materially lessened, if not absolutely destroyed; that she was confined to her bed for a long space of time, and is now and will hereafter be prevented from attending to her affairs and business, and will thereby be deprived of large profits and gains which she would otherwise have gained.

At the trial, the jury returned a verdict in favor of the

plaintiff, and assessed her damages in the sum of \$50,000. The trial judge required the plaintiff to remit \$15,000, and entered judgment against the defendant in the sum of \$35,000.

From this judgment the defendant appeals.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

CASE, HOGAN & CASE, attorneys for appellee; SIMEON P. SHOPE, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The record fails to show any plea by the defendant. It is therefore urged that the verdict was rendered in a case where no issue had been formed, and should, for that reason, be set aside.

The record does show that the defendant demurred to the original declaration, consisting of four counts; that this demurrer was overruled, and the plaintiff permitted to file an additional count, which was afterward withdrawn from the jury. The record further shows that the defendant appeared and voluntarily went to trial as if the plea of the general issue had been filed, and introduced evidence which it would not have had the right to do had not such plea been filed. As a part of the order overruling the demurrer, the record reads: "The defendant required to plead herein within ten days from this date;" that order was entered on September 29, 1894. The case went to trial on the 6th day of January, 1896.

Appellant is now seeking not only to take advantage of its having failed to comply with an order of court, but of that which it is manifest worked no harm to it.

The case is very different from that of *Waggoner v. Green*, 40 Ill. App. 648, in which no declaration had been filed.

In a court of record the plaintiff, for the validity of his judgment, must see to it that the defendant is brought or

comes into court, and also that there are written pleadings showing a cause of action over which the court has jurisdiction. Thus jurisdiction over the person and subject-matter is made to appear.

Unless such written pleading be filed by the plaintiff, there is nothing for the defendant to answer, and he need not appear, because only upon such pleading can a judgment be taken against him. Black on Judgments, Secs. 84 and 183; Van Vleet on Collateral Attack, Secs. 59 to 62.

The defendant is not called upon to do anything to show jurisdiction. If he is brought or comes into court, jurisdiction over him is obtained; his plea confers no jurisdiction, and his failure to plead deprives the court of no right; on the contrary, it confers a right to enter his default, or, to speak more accurately, he thus deprives himself of a right he otherwise had.

Proceeding to trial as if an issue had been made up, when there has been a failure to make an issue, is a waiver of the formal issue, and the trial will be treated as though an issue by plea had been formally tendered. *Douglas v. Matson*, 35 Ill. App. 538; *Strohm v. Hayes*, 70 Ill. 41; *Ross v. Reddick*, 1 Scam. 73; *Kelsey v. Lamb*, 21 Ill. 559; *Barnett v. Greff*, 52 Ill. 170; *Armstrong v. Mock*, 17 Ill. 166.

During the closing argument of counsel for appellee, the following occurred :

“ Mr. Case : Not a single man, woman or child on their side saw that coal wagon except that gripman, who put it there to save himself, and Selle, who, I believe, did not see it at all, says that the coal wagon came from the east and went north. Now that coal wagon was put ahead there to shield himself. Why, he says he has no motive to shield himself. Hasn't he? Suppose he is out, and sore at the company, so he wants to exculpate himself, don't he? But I will tell you what he does do. He brings the liability on that company after shielding himself beyond a possibility of doubt, because he tells you in answer to their own questions, speaking of the brake on that car, that the brakes had been bothering him on that very occasion; that the brake didn't stop.

Mr. Mason: Exception.

Mr. Case: This is evidence which they themselves read, to which I made no exception, for I saw it was going to hoist them. He lays it on the brake. He says the brake wasn't at the very best, and when it comes—after explaining why he was discharged, he says: "That brake had been bothering me on that very occasion," and that Crawford came along, and Crawford said something, and that they had words. The brake was out of order and they brought that out, and so the gripman wants to put the responsibility where it belongs, on the brake, and we say it makes no difference where it was, whether it was the brake or the failure on his part to look north, or the failure to ring the bell, it makes no difference.

Mr. Mason: I take an exception.

There wouldn't have been any outcry, gentlemen, if the gripman had had his hand on the grip and slacked his speed—he had all the way across Sangamon street in which to stop. He could have seen that child if he had been looking. But it was the outcry of the passengers, the protest against the reckless character of this gripman, that called his attention to the child.

Mr. Mason: Exception.

That gripman tells you that he can stop a car in ten or twelve feet, in the face of the testimony of their own gripman—and he gives the reason that he could not stop it—that that brake was out of order; he don't want to exculpate himself, but he tells you that he can stop a train of cars in ten or twelve feet.

Mr. Mason: I want to save an exception to the statement by counsel.

The Court: The court has announced his ruling that there can be no recovery on the ground of a defective brake, nor should such a ground be urged on the jury, and to urge it would be error.

Mr. Case: Where were that gripman's eyes? Why didn't he see the little girl when she left the sidewalk? She had a right to be there. These are public streets. Mad-

ison street is one of the public streets of the city. We have just as much right to be there, and more right to be there, than the street car lines, because they have to operate their machinery of death with care.

Mr. Mason: I take an exception to that statement.

Mr. Case: They have got these juggernauts, modern juggernauts, that crush and mangle and maim.

Mr. Mason: I take an exception.

The Court: Save your exception.

Mr. Case: Who is it that must take care if you point a gun at me? Isn't it for you to take care that you do not pull it—not for me to see that you do not pull it? You have got a deadly weapon in your hands; you must exercise care, not I. This gripman stood here with a gun, a modern instrument of death, and it was his duty to have his eyes to the right and to the left to see that every one that left the sidewalk was protected. He did not do it, and that is as clear in this record as the daylight out there.

Mr. Mason: I take an exception.

The Court: Save your exception.

Mr. Case: Why, gentlemen, I have been trying cases of this kind for the last twenty years, and I am not astonished at the gentleman's attitude of prayer in this case; when they get up and plead for mercy—mercy—what mercy did the gripman show this little child? What mercy or care did he exercise toward her? Are you going to be governed by sentiment, or are you going to do what is right? Are you going to apply your common sense? You know that if the gripman had been looking the child would not have been struck; you know that if he had exercised any care whatever, she would not have been crippled and ruined for life, and I tell you when men, through a gripman, operate these dangerous implements of death, they must abide the consequences, and when gentlemen get up here and talk to you about public highways, it is done to deceive you. They do not see fit to tell you that public highways of this character are run for private profit.

Mr. Mason: I take an exception to that.

The Court : Yes, the question of private property is not in here.

Mr. Case : I do not know that they make any profit; there is nothing in the evidence, but I say these highways are run for the benefit of the people who are interested in them, and I say when they operate death dealing instruments on them, they must abide the consequences, and I do that, gentlemen. I do not appeal to your prejudices. I do not ask you to harden your hearts against this company, or steel it against this little girl. I want you to do by this little girl what you would want the jury to do by you under the circumstances.

Mr. Mason : I will save an exception.

The Court : Yes."

We have no doubt that counsel for appellee, by an innocent misapprehension, misstated the testimony of the gripman as to the brake. His testimony was not that on the trip during which appellee was injured, the brake had been "bothering him;" the trouble with the brake, of which he spoke, occurred in February, 1894, he being discharged immediately afterward; the accident to appellee happened in June, 1892. What the witness stated as to the condition of the brakes on the day of the accident was that they were not the best; that they were as good as the average.

The effect of the misstatement was, however, the same as if it had intentionally been made, and was to induce the jury to believe that the plaintiff had been injured because, among other things, the defendant had allowed its machinery to get out of order. Counsel remarked : "The brake was out of order, and they brought that out, and so the gripman wants to put the responsibility where it belongs, on the brake; and we say it makes no difference where it was, whether it was the brake or the failure on his part to look north, or the failure to ring the bell, it makes no difference."

Although the court did properly remark that there could be no recovery on the ground of a defective brake, yet the court did not, and probably, under the law permitting

written instructions as to the law only, was powerless to protect the defendant from the malign influence of the unwarranted statement that the brake was out of order. To have admitted evidence that the brake was out of order would, under the issues, have been error and cause for reversal; what, then, shall be said as to so forcible a claim to the jury that such evidence existed?

In no proper sense can a grip car be termed an "instrument of death." True, people may be, and sometimes are, killed by such cars; so, too, are they by ordinary wagons, as well as by the most useful and common of utensils and implements.

These can not, for this reason, be properly spoken of as instruments of death, because such is not the purpose for which they are designed or used.

There was no evidence tending to show that the gripman was actuated by malice, ill will or evil intent, in anything that he did, or that he was lacking in the qualities of mercy common to men. To insinuate that he failed to show mercy to the heedless child he saw before him, was not only unjust to the defendant, but cruel to a man who earned his bread by hard work, and whose sense of what is noble, what humanity demands, and desire to be respected by his fellows may be as keen as that of the eloquent counsel who thus stated, or that of the judge who sits upon the bench.

Upon a trial conducted according to the common law, the judge, in summing up, after pointing out what there was evidence tending to prove, would have called attention to the fact that there was no evidence that the gripman was merciless, or that the brake was out of order, and after stating what the questions of fact to be determined by the jury were, would have stated to it the law applicable to the case. The subject could thus have been intelligently and justly placed before the jury.

Under our system of practice, there is practically nothing which the court can do to remove the poison engendered by a maliciously unfair and unjust statement of counsel, save to grant a new trial. Whether the court will, for such

cause, grant a new trial, is a matter resting in its discretion. If from all that was done, as well as from the verdict, the court is of the opinion that the jury were not thus improperly influenced, and that the verdict is in no measure the result of such unfair means, and that the parties have had the trial by jury which, under the constitution and law of this State, is their right, the verdict should not, for the misconduct of counsel, be set aside. *Harms v. Stier*, 67 Ill. App. 634; *W. C. St. Ry. Co. v. Annis*, Supreme Court of Ill., opinion filed Nov. 9, 1896; *McDonald v. The People*, 126 Ill. 150.

In the case at bar, after listening to the address before quoted, the jury rendered a verdict of \$50,000 for the plaintiff. The sum is startling by its magnitude. While it is true that it may be said that this sum is not an adequate compensation for the injury to appellee, and that no amount could be declared to be a complete compensation, yet it is not the case that the award of damages for such an injury rests in the uncontrollable discretion of a jury.

The verdict in this case is, for a personal injury, the largest we have ever been called upon to consider. Instances of injuries as severe as those of appellee, the result of alleged negligence, have been called to our attention, and verdicts therefor rendered have been brought before us, but in no other instance has a jury awarded so large a sum. The amount here given exceeds by many thousand dollars that which any other jury has, to our knowledge, awarded.

Equal justice should be administered to all. We, indeed, know that the attainment of this high ideal is impossible, yet our duty to strive for it remains, and is ever to be kept in mind.

Our experience leads us, irresistibly, to the conclusion that the very large and most unusual verdict rendered in this case, was the result, in some measure, of the inflammatory and improper address of counsel. So believing, we feel compelled to set aside the judgment rendered.

The trial court, enforcing a remittitur, entered judgment for \$35,000. This action was most commendable, so far as

it went, but left the plaintiff in possession of substantial fruits of an unfair proceeding.

It is argued that the defendant confined itself to objecting to the remarks of counsel, and did not call for a ruling thereon. The speech of counsel was urged as ground for a new trial, and this we think sufficient to present the question.

As to continued interruptions during an address and an insistence of a ruling thereon by the court at that time, the remarks of the court in *Berry v. The People*, 10 Ga. 511, are appropriate. Lumpkin, Judge, said: "It is contended that it was the duty of the court to have stopped the counsel or to have disabused the minds of the jury, by way of charge, from the improper impressions thus produced. That the practice complained of is highly reprehensible, no one can doubt. It ought in every instance to be promptly repressed. For counsel to undertake by a side wind, to get that in as a proof which is merely conjecture, and thus to work a prejudice in the mind of the jury, can not be tolerated. Nor ought the presiding judge to wait until he is called on to interpose. For it is usually best to trust to the discrimination of the jury as to what is, and what is not, in evidence, than for the opposite counsel to move in the matter. For what practitioner has not regretted his untoward interference, when the counsel thus interrupted, resume, "Yes, gentlemen, I have touched a tender spot; the galled jade will wince; you see where the shoe pinches.'"

The judgment of the Superior Court is reversed and the case remanded.

MR. JUSTICE GARY.

This court of late years has not done its duty upon objections to verdicts because of the conduct of attorneys.

It may not be too late to do works meet for repentance.

MR. PRESIDING JUSTICE SHEPARD.

I do not think the judgment ought to be reversed altogether, because of the assigned improper argument of counsel.

In cases of personal injury where this court shall, for any such reason as appears in this record, be satisfied that the verdict was excessive, my opinion is that public convenience and justice to the litigants is best served by requiring a remittitur to be entered as a condition to an affirmance.

In this case, the injured girl suffered the loss of an entire leg, up to the hip, through the negligence of the appellant as found by the jury, and is meritoriously entitled to a recovery of substantial damages by way of compensation. Why, then, remand the cause for another trial, at great expense to the public, and deprivation to the injured one, when upon such other trial it is almost certain a recovery for a considerable amount will be had, without, at least, giving to her and her advisers the opportunity to say that she will accept a sum that this court may, upon a consideration of the whole case, think would be to her a just compensation under the law? Reversed and remanded.

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Charles Kaestner et al. v. The First National Bank.

1. CONSIDERATION—*Evidence as to, When Admissible.*—Under a plea alleging a want of consideration for a guaranty, evidence showing what the consideration was, is properly admissible.

2. VARIANCE—*Parties Not Sued.*—The fact that the evidence in a suit upon a guaranty showed that others, not made parties, also guaranteed, does not disclose a variance.

3. WAIVER—*Of Replication.*—Where only a formal replication is needed, it is waived by going to trial without it.

4. GUARANTY—*Questions in Suit upon.*—In a suit upon a guaranty stamped on the back of a promissory note, the question is not alone when the guaranty was stamped on the note, but rather, was it the expression of a valid contract made by the defendants.

Assumpsit, upon a guaranty. Appeal from Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

REMY & MANN, attorneys for appellants.

ORVILLE PECKHAM, attorney for appellee.

Kaestner v. First National Bank.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee brought suit against appellants, as guarantors of the following note :

“\$3,000. CHICAGO, November 12, 1892.

Three months after date I, or we, promise to pay to the order of Chas. Kaestner & Co., three thousand dollars with interest at six per cent per annum, at room 218, First National Bank.

COLEMAN & AMES WHITE LEAD CO.,
Per GEO. J. WILLIAMS,
Mgr. & V. Prest.”

(SEAL.)

On the back of the note when offered in evidence were the following indorsements :

“CHAS. KAESTNER & Co.”

“For value received we indorse and assign this note to First National Bank, Chicago Ill., and do further hereby guarantee the payment of the same at maturity or any time thereafter, with interest at seven per cent per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same.

GEORGE J. WILLIAMS.
CHARLES KAESTNER & Co.”

Appellants, by plea under oath, denied the execution of the guaranty, and also filed a plea of want of consideration, to which plea no replication was filed by appellee.

There was a verdict in favor of appellee for the face of the note with six per cent interest from its date, and after motions of appellants for a new trial and in arrest of judgment were overruled, a judgment was rendered upon the verdict.

Counsel for appellant say :

“The question of paramount importance in this case was as to whether the guaranty sued on was on the back of the note at the time Hecht, one of the appellants, wrote the firm name of Kaestner & Co. thereon. As to this question there was great conflict in the testimony.”

Having examined the conflicting evidence as to this mat-

ter, we find no sufficient reason for interfering with the conclusion of the court below in this regard.

Appellants having filed a plea alleging a want of consideration for the guaranty, evidence was properly admitted to show what the consideration was.

The objection that appellee did not bring suit against all the guarantors, if valid, was not interposed by a proper plea.

The evidence showed that the defendants guaranteed; proof that others also guaranteed, did not disclose a variance.

The case was tried as if a replication to the defendants' plea of a want of consideration had been filed. If this plea was as shown in the abstract, only a formal replication was needed, and this appellant waived by going to trial without it. *Ross v. Reddick*, 1 Scam. 73; *Strohm v. Hayes*, 70 Ill 41; *W. C. St. Ry. Co. v. Kreuger*, p. 450, this volume.

In *Klein v. Currier*, 14 Ill. 237, it was held that in suit upon a special guaranty, no special plea for want of consideration is necessary.

The question was not alone when the guaranty was stamped on the note, but rather, was such guaranty the expression of a valid contract made by the defendants.

The court, therefore, properly refused to instruct the jury that unless the plaintiff proved its case by a preponderance of the evidence, they should find for the defendants.

The judgment of the Circuit Court is affirmed.

Clarence E. Smith and Samuel A. Low v. Charles A. North and Louis D. Taylor.

1. *PLEAS—Amounting to the General Issue.*—The sustaining of a demurrer to a plea, which set up matters that were admissible under the general issue, can not be assigned as error when the general issue was also pleaded.

2. *PROMISSORY NOTES—Indorsed by Third Persons—Presumption of Liability—Evidence in Rebuttal.*—The signature of a person, other than the payee on the back of a promissory note, is *prima facie* evidence

Smith v. North.

that he assumed the liability of guarantor; and in a suit on such a contract it is a question of fact for the jury whether the evidence introduced is sufficient to remove the legal presumption of guaranty.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

STATEMENT OF THE CASE.

This was a suit brought against the appellants, charging them as guarantors upon a promissory note in words and figures following, to wit:

"\$8,000. CHICAGO, ILLS., February 1, 1894.

Ninety days after date I promise to pay to the order of North & Taylor, Bankers, \$8,000, at their office for value received, with interest at seven per cent per annum.

DONALD R. WILSON."

(Indorsements:)

"Interest paid to May 5, 1894.

Interest paid to August 6, 1894.

Interest paid to November 7, 1894.

Interest paid to May 5, 1895.

We hereby guarantee the payment of the within note at maturity.

SMITH & LOW,
SMITH & LOW."

The jury found the issues for plaintiffs below, but allowed the appellants credit for \$685.10, being an amount paid by them for taxes at the request of said plaintiffs.

The defendants below pleaded the general issue and that the maturity of the said note had been extended against their protest; that the payment of the said note had been secured by a trust deed upon real estate in Cook county, Illinois; that at the time of the making thereof, it was agreed by and between the parties thereto that the said North & Taylor should proceed against the maker of said note by foreclosure proceedings, or otherwise to enforce the payment thereof, and that the defendants should only be liable for the defi-

ciency that might remain after the foreclosure proceedings and sale of said premises had been made and consummated; that said plaintiffs therein had filed their certain bill to foreclose said trust deed given by the maker of the said note and had proceeded to a decree for the sale of the premises mentioned and described in said trust deed, directing the sale thereof by George Mills Rogers, a master in chancery of the Circuit Court; that said master has proceeded to advertise said premises for sale, and said defendants and other persons in a position to pay for said premises were present at the time and place indicated in the said notice of sale; that these defendants, and the said persons interested in the sale thereof, demanded that the said master in chancery, at the time and place provided in said notice, offer said premises for sale, and that the said plaintiffs, by their attorney, then and there refused to permit the said premises to be sold, and that the said master was directed to disregard said notice, and to not offer the said premises for sale; that said defendants and such other persons then and there offered to the said master to pay the amount due and owing upon the said note, which offer was then and there refused by the plaintiffs in said cause, and the master was forbidden by the said plaintiffs the privilege of offering the said premises for sale.

RUNYAN & RUNYAN, attorneys for appellants.

COOLIDGE, LEE & LEE, attorneys for appellees; HENRY C. NOYES, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The matters presented by the special pleas were, so far as any defense was thereby disclosed, admissible under the general issue; the defendants' demurrer was therefore properly sustained.

The defendants might, and did, resort to parol evidence to prove what the contract made between the parties was. The

Dearlove v. Edwards.

signatures of the defendants on the back of the note were *prima facie* evidence that the defendants assumed the liability of guarantors; whether the evidence introduced was sufficient to remove the legal presumption of guaranty was a question of fact for the jury. *Kingsland et al. v. Koeppe et al.*, 137 Ill. 344.

The defendants were allowed to introduce all the competent evidence offered by them on this question.

We find no error warranting a reversal of the judgment of the Circuit Court and it is affirmed.

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188 619

George M. Dearlove and George Dearlove v. Edward W. Edwards.

1. **USURY—*Note Made in Another State.***—In order to sustain the defense of usury to a note made in another State, the defendant must plead and prove the statute which the note violates. Without such a statute there could be no defense on the ground of usury as by common law there was no usury.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

CHARLES LANE, attorney for appellants.

R. A. CHILDS and CHARLES HUDSON, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This was an action by the appellee, upon a promissory note made by the appellants, dated Chicago, November 26, 1894, bearing interest at the rate of eight per cent per annum. The defense was usury, as the statute of June 17, 1891, which took effect July 1, 1891, fixed the highest lawful rate at seven per cent.

But the note was delivered to the appellee, and was payable in Iowa. The appellants say it "is an Iowa contract and governed by the laws of" Iowa. The burden then was upon them to show that by those laws usurious interest was reserved; they made no such showing.

We take notice that the common law prevails there, but not of any of the statutes of that State. By common law there was no usury.

Giddings v. McCumber, 51 Ill. App. 373, is in point, and the judgment is affirmed.

Poole Brothers, a Corporation, v. Albert N. Marquis.

1. *CONTRACTS—Calling for First-class Work—Duty of Contractor When Poor Material is Furnished.*—A suit to collect the amount alleged to be due for presswork and binding, was defended on the ground that the work was poorly done, and that paper furnished by the defendant was spoiled. The plaintiff insisted that the paper when delivered to him was unseasoned and charged with electricity, and that because of these things, the work done thereon was poor. *Held*, that if the paper was in an unsuitable condition, the plaintiff should not have used it.

Assumpsit, on the common counts. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

STATEMENT OF THE CASE.

This was an action of assumpsit brought by appellant, a corporation, against appellee, to recover the value of certain presswork and binding done for defendant. Poole Brothers, railroad printers and engravers, did a large amount of printing, binding, engraving and electrotyping for the defendant at his special request. After a portion of the work was done and delivered to defendant, he refused to receive the balance and refused to pay for any of the work.

The appellee, defendant, claims that the appellant, Poole

Poole Brothers v. Marquis.

Brothers, contracted to do the best work and failed to do so, and also spoiled some of the paper furnished by appellee.

To this claim it is replied that appellee agreed to furnish the best quality of paper for the work, and to furnish the same in time, but failed and refused to do so, and that appellee interfered with appellants' employes in their doing of this work, and therefore, if there were any part of the work not of the best quality, it was the fault of appellee solely. Appellant also claims that most of the work was accepted by appellee with full knowledge, or with an opportunity of full knowledge, of the character and quality of the work.

The jury found the issues for the defendant, and the court rendered judgment therein.

The plaintiff appeals.

WILSON & ZOOK, attorneys for appellant.

SMITH, HELMER, MOULTON & PRICE, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The agreement between appellant and appellee for the doing of the work out of which this controversy arose, is substantially shown by the following letters:

"CHICAGO, Feb'y 5, 1894.

A. N. Marquis & Co.,

Security Building, Fifth Ave. & Madison St., City.

GENTLEMEN: We will do the presswork on the cut forms for your Art Portfolio at rate of \$2.00 per 1,000 impressions. Will do the binding, 24 pages and cover, at \$2.50 per 1,000 books; 20 pages and cover, \$2.35 per 1,000 books; the covers to be wire-stitched on; you to furnish paper and all plates.

Yours, very truly,

POOLE BROS."

"February 6, 1894.

Messrs. Poole Brothers,

316 Dearborn street, Chicago.

GENTLEMEN: We accept your bids for presswork and binding on our Marie Burroughs Art Portfolio of Celebri-

ties, as contained in your favor of the 5th inst. This acceptance is based on the understanding that you are to furnish us with your best quality of work on this job.

Yours truly,

A. N. MARQUIS & COMPANY."

It is insisted that appellee did not furnish the best quality of paper or supply the same in proper time.

The contract was not that appellee would furnish the best paper. There is evidence that the paper supplied was good paper, and such as appellant, after seeing twenty-seven reams thereof, pronounced perfectly satisfactory.

Appellant insists that the paper when delivered to them was unseasoned and charged with electricity, and because of these things the work done thereon was poor.

If the paper was unseasoned and so electrified as to be in an unsuitable condition, appellant should not have used the same; these things were known to appellant, and it should not have gone on to do poor work and spoil the paper which time and exposure would have put in a condition for good work.

Appellant might, if improperly delayed by appellee, have been entitled to compensation for the delay, but can not urge as an excuse for poor work the use by it, with full knowledge, of unseasoned paper.

It is hardly necessary to discuss these matters, as the finding upon conflicting evidence was against appellant. Only questions of fact are involved in this appeal.

The judgment of the Circuit Court is affirmed.

**James A. Kirk et al. v. The Elmer H. Dearth Agency,
for the use of Michael Doran.**

1. *GARNISHMENT—When Garnishee May Attack Judgment.*—A garnishee may attack the judgment against the principal defendant for lack of jurisdiction, but not for mere errors not touching the jurisdiction.

2. *ATTACHMENT—Service by Publication May Expire During Term.*—The present statute does not require that the three weeks publication

Kirk v. The Elmer H. Dearth Agency.

in an attachment suit shall be made ten days before the term at which judgment is taken; if the court is in session ten days after the last publication, the plaintiff may take judgment by default if there is no appearance, even where the suit was brought within less than ten days before the commencement of the term.

Attachment and Garnishment.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

REMY & MANN, attorneys for appellants.

TENNEY, McCONNELL & COFFEEN, attorneys for appellee Michael Doran.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

November 30, 1895, Doran commenced, in the Superior Court, attachment against the agency, the ground of attachment being non-residence. The writ was made returnable on the second day of the then next December, which was the first day of the then next term of that court. The appellants were summoned as garnishees in the suit the same day that the writ issued. Publication of notice to the agency was begun the same day. The publication and mailing of notice complied with the letter of the statute, the last publication being December 14th, and the mailing December 9th; the declaration was filed December 10th, and December 26, 1895, judgment by default was entered against the agency, it not having appeared in the suit.

The only question in the case is, whether the Superior Court had jurisdiction to enter that judgment. If it had, the appellants have no case—if it had not, the appellees have none. Both sides agree to that.

Garnishees can attack the judgment against the principal defendant for lack of jurisdiction, but not for mere errors not touching the jurisdiction. *Dennison v. Blumenthal*, 37 Ill. App. 385; *Dennison v. Taylor*, 142 Ill. 45.

The attachment act nowhere provides, when, or to what term, a writ of attachment shall be made returnable.

The form of the writ given in Sec. 6 is "at a court to be holden * * * upon the — day of — next."

Sec. 25 says that "The declaration shall be filed on the return of the attachment, or at the term when the same is made returnable."

Sec. 26 is "The practice and pleadings in attachment suits, except as otherwise provided in this act, shall conform, as near as may be, to the practice and pleadings in other suits at law."

Under Sec. 1 of the practice act "The plaintiff may, in any case, have summons made returnable at any term of the court which may be held within three months after the date thereof."

Now the argument of the appellants is, that, as under the practice act a plaintiff is not entitled to judgment by default in case of non-appearance by the defendant unless he has been served with process, and the declaration filed not less than ten days before the first day of the term at which such default is taken, therefore in an attachment case the plaintiff is not entitled to judgment by default, at a term commencing less than ten days after the suit was begun.

So much of the practice act as relates to the time of filing the declaration is not applicable, for that is regulated by Sec. 25, as quoted. Nor is the provision of the practice act as to the time of service of summons applicable to services by publication; not only because there is no analogy between them—the one being complete by one act of reading the summons to the defendant, the other requiring publication for three successive weeks, and mailing a copy to the defendant—but also because the time of taking default upon service by publication is regulated by the attachment act in Sec. 23, saying, "no default * * * shall be taken * * * until the expiration of ten days after the last publication."

Now it is true that the notice published under Sec. 22, does, in any case in which the last publication is after the term to which the writ is returnable has commenced, by

N. Y. Morning Journal Ass'n v. E. H. Dearth Agency.

the last publication call the defendant to appear upon a day that has passed; but as to effects which may be reached by attachment in this State, the owner is subject to the laws of this State, and must know—be conclusively presumed to know—what those laws are; and when the published notice tells him, as in this case, that he must appear on the second day of December, he is thereby informed that if he comes on the twenty-fourth he will be in time. In like manner, when a defendant is served with summons to appear upon a certain Monday within less than ten days, he is thereby informed that, in this county, it is another Monday, four or five weeks off, to which he is called.

There is probably this inconsistency: that if a defendant in an attachment suit is personally served less than ten days before the return day, he is not in default at that term by not appearing; while if he is served by publication of which the last is in the middle of the term, he may be in default before that term ends. The whole letter of the statute seems to be complied with in entering the judgment in this case, and the principles upon which *Mechanic's, etc., v. Given*, 82 Ill. 157, and *Lawyer v. Langhaus*, 85 Ill. 138, went, are conclusive.

The judgment is affirmed.

**New York Morning Journal Association et al. v. The
Elmer H. Dearth Agency, for the use of
Michael Doran.**

1. MEMORANDUM.—The views expressed in *Kirk et al. v. Elmer H. Dearth Agency*, for use, etc., are conclusive of this case. See page 468 this volume.

Intervening Petition, in an attachment suit. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

NEWMAN, NORTHRUP & LEVINSON and WILLIAM E. O'NEILL,
attorneys for appellants.

TENNEY, McCONNELL & COFFEEN, attorneys for appellee
Michael Doran.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The affirmance of the judgment in *Kirk v. this appellee* (page 468 this volume), takes out of this case everything of practical importance, and we will not discuss abstract questions, but affirm the judgment.

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100 287

Chicago City Railway Company v. William C. Allen.

1. INSTRUCTIONS—*Duplication of.*—A party is not entitled to a second statement to a jury of the same proposition of law.

2. MEASURE OF DAMAGES—*In Action for Personal Injuries.*—The following instruction is a correct statement in regard to the measure of damages in a personal injury case:

"If the jury, under the evidence and instructions of the court, find for the plaintiff, they should assess the plaintiff's damages, and in assessing his damages the plaintiff will be entitled to recover for any pain and anguish which he has suffered, or will hereafter suffer, in consequence of said injury; for any and all damages to his person, permanent or otherwise, occasioned by said injury; for loss of time if any be proved, occasioned by said injury; and generally, the plaintiff will, if the jury find the defendant guilty, be entitled to recover all damages alleged in the declaration, which they may believe from the evidence he has sustained by reason of said injury."

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

WILLIAM J. HYNES, attorney for appellant.

CASE & HOGAN, attorneys for appellee; WILLIAM P. BLACK, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant for injury he alleged he sustained by being thrown down by the sudden starting of a car upon which he was stepping. Upon the conflicting evidence, the verdict of the jury settles that part of the case in his favor. One of the witnesses of appellee testified that he was voting at a primary election, at the corner of Cottage Grove avenue and 32d street; another, that the primary was held at the same place as the general election; and then the appellant offered to show in which of several precincts was the corner of 32d street and South Park avenue.

What was the pertinency of any corner of South Park avenue, does not appear.

The appellant complains of an instruction as misleading, which reads as follows:

"If the jury, under the evidence and instructions of the court, find for the plaintiff, they should assess the plaintiff's damages, and in assessing his damages the plaintiff will be entitled to recover for any pain and anguish which he has suffered, or will hereafter suffer, in consequence of said injury, for any and all damages to his person, permanent or otherwise, occasioned by said injury; and generally, the plaintiff will, if the jury find the defendant guilty, be entitled to recover all damages alleged in the declaration, which they may believe from the evidence he has sustained by reason of said injury."

The particular manner in which it is alleged that the instruction is misleading, is that on the trial the appellant endeavored to establish that a hernia, and other ailments from which the appellee suffered, were old, and not in consequence of the negligence by the appellant of which he complained; and also that the instruction assumes the pain, etc.

The most careless reading of the instruction could never extend its meaning to anything beyond what the jury might "believe from the evidence" to be the consequences of the alleged negligence.

At the request of the appellant, the court gave an instruction, No. 13, as follows:

"If the jury believe from the evidence that any witness has willfully and knowingly sworn falsely to any material point in the case, they have the right to reject the entire testimony of such witness or witnesses in matters where their testimony is not corroborated by other witnesses whom they believe to be credible, or facts and circumstances appearing in evidence."

The appellant also requested and the court refused one, No. 17, as follows:

"The jury are instructed that it is a principle of law that if you believe from the evidence any witness has willfully and knowingly sworn falsely to any material element in the case, or any witness has willfully and knowingly exaggerated any facts or circumstances for the purpose of deceiving, misleading or imposing upon the jury, either as to the origin of the plaintiff's ailments, so far as from all the evidence you believe they exist, or as to the nature or extent of the injury, then the jury have a right to reject the entire testimony of such witness unless corroborated by other evidence which they believe, or by facts and circumstances that appear in the case."

Now No. 13 includes in general terms all that is specially mentioned in No. 17, and, except as to such special matter, No. 17 is but a substantial repetition of No. 13. A party is not entitled to a second statement to a jury of the same proposition of law. *Chicago City Ry. v. Van Vleck*, 143 Ill. 480.

Had the special matter been made the sole subject of an independent instruction, a question not now to be considered, would have been presented.

The affidavits of new evidence do not call for any comment.

There is no error in the record. There is enough evidence, if true, to justify the verdict, and it is a legal presumption that the jury impartially considered the evidence on both sides.

The judgment is affirmed.

The Carey-Lombard Lumber Company v. William H. Burnet et al.

1. **MECHANIC'S LIENS**—*Taking Other Security—What Amounts to.*—A lumber company sold lumber to a person, supposing him to be the owner of the ground on which it was to be used, and took his note for the amount due for such lumber. On discovering their error they immediately filed a claim for a mechanic's lien, against the true owner of the property, but at a later day obtained judgment on said note. *Held*, that the action of the lumber company in taking judgment on the note with knowledge of the facts, amounted to taking additional security and forfeited their lien.

Bill for Foreclosure, and answer setting up mechanic's lien. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

COWEN & HOUSEMAN, attorneys for appellant.

OLIVER & MECARTNEY, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The question here is whether the appellant, under the law as it stood before the revision of June 26, 1895, has a mechanic's lien, and it arises upon the report of a master, as follows—copying from the abstract:

“That on or about August 20, 1891, one A. E. Case, representing himself to be the owner of said premises, applied to said lumber company for it to furnish lumber and building material to be used in the building on said premises; that thereupon a verbal contract was entered into, and lumber was furnished which actually went into and became part of the building, commencing on August 20, 1891, and ending December 31, 1891, to the total amount of \$2,072.05, upon which should be credited for lumber returned, \$12.60, leaving unpaid \$2,059.45. There was an implied agreement that said material should be paid for when entirely delivered.

On May 10, 1892, said lumber company filed a claim for lien with the clerk of the Circuit Court, No. 4,746, showing commencement and completion of said delivery, as shown just above, containing also a correct description of the property, and the amount due said company from Ella L. Cady, said claim being duly verified by an affidavit; that Ella L. Cady knew of the delivery of said lumber from time to time, and watched the same as it was going into and becoming part of the building. I find that she is therefore estopped from denying that the purchase of said lumber was authorized by her and for her benefit; that the furnishing of material under said claim should be considered as ending on December 31, 1891, and not on April 23, 1892; I find that the lumber company did not know that Ella L. Cady (and not A. E. Case) was the owner of the premises until the day said claim for lien was filed. Some time prior to December 31, 1891, said A. E. Case verbally agreed with said lumber company that he would pay for the material within thirty, sixty or ninety days after the delivery. I find that this amounts to an extension of the time of payment, being before all the material was delivered, and operated as such valid extension of the time of payment to ninety days after December 31, 1891, and that therefore said claim for lien filed on May 10, 1892, was filed in due time; that A. E. Case, on December 10, 1891, gave his note to said company for said material; that said company still relied on his statement that he was the owner, and believed that he was the owner; and on account of this belief I find that the taking of the note should not be considered as the taking of outside security, and hence not a waiver of the lien; however, on May 13, 1892, three days after said company had ascertained that Ella L. Cady was the owner of the premises, said company obtained judgment on said note against said Case; that the taking of said judgment three days after knowledge that Ella L. Cady was the owner, puts the company in the position of taking outside security; that therefore said company has no lien upon the interest of Ella L. Cady in said premises, everything else being proved to maintain such lien."

Dameier v. Bayor.

The court concurred with the master, denied the claim of the appellant, and this appeal is from the decree so denying.

The appellant cites a couple of Pennsylvania cases, the application of which to this case we could not determine without reference to the statutes of that State. To those statutes no allusion is made in the brief of the appellant, and we can not be expected to search for them.

To our minds the conclusion of the master is right. Coleman's Mechanic's Liens, Sec. 199.

The decree approving his report is affirmed.

C. W. Dameier v. W. A. Bayor.

108 477.
107 547

1. *SET-OFF—Claims Must be in the Same Right.*—A claim against a partnership can not be set off against a debt due to a member of such firm, and the fact that the person contracting with the firm thought that it really contained only one person, is immaterial.

Assumpsit, on common and special counts. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

JOHN N. JEMISON, attorney for appellant.

W. H. CRAIG, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover for brick and stone sold by appellee to appellant, and also for the rent of lot 1425 Wabash avenue, for eleven months, at \$25 per month.

In support of plaintiff's claim, on the trial below, the agreement regarding the sale of brick and stone was introduced. It is as follows:

"I hereby agree to purchase from W. A. Bayor a lot of

brick and rubble stone, delivered to 1429 Wabash avenue, for which I agree to pay at the rate of \$5 per thousand for brick, and \$8 per cord for stone—the amount of brick not to exceed 325 thousand, and stone not to exceed 107 cords.

C. W. DAMEIER.”

As a set-off, appellant offered in evidence a written contract made by him with C. W. Dameier & Son, for doing the mason work of certain houses, claiming that there was due to him thereunder a considerable amount which should be set off against appellee's claim.

The claims are not in the same right. A claim against a partnership can not be set off against a debt due to a member of such firm.

That appellant did not know that C. W. Dameier & Son was a firm composed of two persons, is immaterial.

The judgment of the Superior Court is affirmed.

Benjamin L. Cook et al. v. Illinois Trust and Savings Bank.

1. **INTEREST**—*Will be Allowed on Coupons Given for Interest.*—Where a note is given for a principal sum, and also coupon notes for the interest thereon, such coupons will draw interest after their maturity.

2. **APPEALS AND ERRORS**—*A Party can not Complain of Errors that do not Affect Him.*—An appellant can only complain of errors that affect his own right, and not such as affect only the rights of others who do not complain.

3. **ATTORNEY'S FEES**—*Provided for by Contract.*—A party to a contract can not complain of the allowance of attorney's fees which are provided for by the contract.

Bill for Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

WILLIAM M. JONES and W. IRVING CULVER, attorneys for appellants.

JAMES C. HUTCHINS, attorney for appellee.

Cook v. Illinois Trust and Savings Bank.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This appeal is by Benjamin L. Cook and his two adult daughters, from a decree rendered against them and a minor son and daughter, of foreclosure of a mortgage made by Will H. Moore, to secure indebtedness of Moore to the bank, and which indebtedness the deceased wife of Benjamin L., and mother of the other appellants had, in her lifetime, assumed to pay, upon a purchase by her from Moore of the premises covered by the mortgage.

The first point urged is, that the bill is multifarious, but without any showing why it is so. We suppose the fact that a release had been, by mistake, executed and recorded, and the bill for a foreclosure in common form, also sought to have the release set aside, is the ground of the objection, which, without further notice, we disregard.

Then it is said that interest was compounded. What would be the right amount of interest, we are not informed, and will not for ourselves make the calculation.

We suppose the only compounding was in calculating interest upon over-due interest coupons, which is not wrong. *Harper v. Ely*, 70 Ill. 581.

There was a mortgage to secure indebtedness from Mrs. Cook to Moore, and upon a cross-bill in this suit, a decree of foreclosure on that mortgage, and complaint is made of a feature of that decree.

That decree is not appealed from, and we have nothing to do with it.

Solicitor's fees to the appellee are less than three-fourths of the amount which the mortgage made by Moore would justify, and the appellants can not complain. *Primley v. Shirk*, 60 Ill. App. 312; 163 Ill. 389.

Whether there were any irregularities as to the infants, we do not inquire. The appellants can not assign error on that which does not concern themselves. *Boyle v. Boyle*, 158 Ill. 228.

The decree is affirmed.

Benjamin L. Cook and Edith Denison Cook v. Don A. Moulton, Trustee, and the Globe National Bank of Chicago.

1. **CHANCERY PRACTICE—*Oral Evidence at Trial.***—In a cause which had been referred to a master in chancery to take and report the evidence, the decree recited that the cause was heard “upon the testimony, proofs and exhibits produced by the respective parties, in open court.” *Held*, that the decree being right in itself, ought not to be interfered with without a showing of what was so introduced.

2. **WRIT OF ASSISTANCE—*Provision for in a Decree Construed.***—A clause in a decree providing, “that in default of surrendering such possession, a writ of assistance may issue in accordance with the practice of the court,” gives no right to the writ without further action by the court, and is not a violation of the rule that, before a writ of assistance can issue, there must be a judicial investigation ascertaining the facts justifying such writ.

Bill for Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

WILLIAM M. JONES and W. IRVING CULVER, attorneys for appellants.

JAMES B. STURMAN, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants' stock of errors is getting low, having been pretty well used up upon two former appeals.

It is now said that a recital in the decree that the cause was heard *inter alia*, “upon the testimony, proofs and exhibits produced by the respective parties in open court,” shows that evidence was introduced at the hearing, contrary to the rule laid down in *Cox v. Pierce*, 120 Ill. 556. Suppose that to be true, which probably it is not, but that the clause in the decree objected to was copied in without reflection; is a decree right in itself to be reversed, with no showing of what was so introduced? The position of the

West Chicago St. R. R. Co. v. Waniata.

appellants is, that if the recital be true, it is error because of the fact; if it be not true, it is error because of the fiction. We do not concur.

The further objection is made, that the language of the decree leaves to the clerk the duty to issue a writ of assistance, without regard to "what events or equities may supervene."

That portion of the decree is :

"It is further ordered, adjudged and decreed that upon the execution and delivery of such conveyance or conveyances, the purchaser or purchasers, his or their representatives or assigns, be let into possession of said premises, and that any of the defendants to this cause who may be in possession of the whole or any part thereof, and that any person who, since the commencement of this suit, has come into possession thereof under them or either of them, upon the production of such conveyance or conveyances, shall surrender such possessions forthwith to such purchaser or purchasers, his or their successors, representatives or assigns, and that in default of surrendering such possession, a writ of assistance may issue in accordance with the practice of the court."

Before a writ of assistance can issue, there must be a judicial investigation, ascertaining the facts justifying such writ.

The last clause of the decree gives no right to the writ without further action by the court.

The decree is affirmed.

68	481
109	17

West Chicago St. R. R. Co. v. Frances Waniata, Administratrix, etc.

1. **NEGLIGENCE**—*Street Car Companies must give Passengers Reasonable Opportunity to Alight.*—A street car company is bound to afford a passenger a reasonable opportunity to alight with safety, and the crowded condition of a car is no excuse for lack of attention to a request

of a passenger, that a car stop for him to get off. The failure of a conductor to hold a car until a passenger has a reasonable opportunity to get off at a place and in a manner that would not subject him to injury by a passing team drawing another car, is negligence.

2. *DAMAGE—For Killing a Boy Five Years Old—\$3,000 not Excessive.*—A judgment for \$3,000 in favor of the administrator of a boy five years of age, killed through the negligence of the defendant, is not excessive compensation for such killing.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

STATEMENT OF THE CASE.

This was an action by Frances Waniata, as administratrix of the estate of William Waniata, deceased, to recover damages for the death of her intestate, caused by the alleged negligence of the West Chicago Street Railroad Company.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

FRANCIS T. MURPHY, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The accident happened to a small boy, a passenger, while endeavoring to alight from one of defendant's cars. The deceased was out with his mother, who, in charge of several children, having ridden on the car to her destination, attempted to get off. The car stopped, the mother with a babe in her arms got safely off; the deceased, five years of age, attempted to follow his mother, but was prevented by the crowded state of the car from keeping close to her, and got off from the opposite side of the car. In so doing, he was struck by a team of horses drawing one of appellant's cars, in a direction opposite to that in which the car, whereon the deceased had ridden, was going.

It is probable that the conductor did not, in the crowd,

Combs v. New Albany National Bank.

notice that the deceased was trying to get off, as the car seems to have started and gone some distance before he jumped.

Appellant was bound to afford the deceased a reasonable opportunity to alight with safety. The crowded condition of its car is no excuse for lack of attention to the request of the deceased that the car stop for him to get off. The conductor was bound to pay heed to the manifest movements and desire of the deceased, and appellant was negligent in not holding its car until the deceased had a reasonable opportunity to get off at a place and in a manner that he would not be injured by a passing team drawing another car.

The judgment for \$3,000 not being, in the opinion of a majority of the court, excessive, is affirmed.

H. H. Combs v. New Albany National Bank.

1. CORPORATIONS—*Status of Property of, When Insolvent—The Doctrine at Law and in Equity.*—The rule that the assets of an insolvent corporation are a trust fund for the payment of creditors, and that directors can receive no preference or advantage from their insolvent corporation over others, is purely a doctrine of equity, and until a court of equity acts, an assignment of property made by an insolvent corporation to its directors, or some of them which is otherwise legal, will stand.

Intervening Claim, in an attachment suit. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

W. N. HORNER and FRANK M. LOWES, attorneys for appellant.

TENNEY, McCONNELL & COFFEEN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. This is a contest over money paid into court by a garnishee; the appellant claiming by attachment against the

New Albany Rail Mill Company, and the appellee claiming under a prior assignment of the fund from which the money came, made to the appellee by the Mill company.

The claim of the appellant is, that the assignment was made when the Mill company was hopelessly insolvent, and that the stock and management of the Mill company and of the bank were both mainly in the same hands, so that an assignment by the Mill company to the bank was fraudulent as to other creditors, under the doctrine of *Beach v. Miller*, 130 Ill. 162. He does not deny the fact of sufficient consideration for the assignment, but denies the right of the Mill company to give a preference to the bank under such circumstances.

The case of *Roseboom v. Whitaker*, 132 Ill. 81, followed in *Atwater v. American Ex. Bank*, 152 Ill. 605, decides that where a stranger to a corporation has, by levy of attachment or execution, acquired what would be a first lien upon tangible property of a corporation, but for a prior voidable judgment against the corporation—a judgment authorized by the directors, and by which they attempted to secure to themselves preferences in the disposition of the assets—that in such case the prior judgment being by proceedings in chancery avoided, the levy for the benefit of the stranger would take effect, and secure to him a preference, as if the avoided judgment had never existed.

Here is no appeal to equity. The appellant has, at most, only such a hold upon the fund as is subject to prior equitable assignment. *Harlev v. Harlev*, 67 Ill. App. 138.

This is a proceeding at law. The assignment is such as the law will notice when it comes in conflict with a garnishment. The fiduciary character of the officers of the Mill company, and that by reason of their interest in the bank, they were unfaithful in the duty they owed to the general creditors of the Mill company, is purely a doctrine of equity, and until a court of equity acts, the assignment must stand.

The judgment in favor of the appellee is affirmed.

John Gaynor v. Hibernian Savings Bank.

68 485
166s 577

1. **AFFIDAVITS**—*Seal Shows Official Character of Officer.*—A jurat with the seal of a notary public impressed was signed by him as “clerk.” *Held*, that the seal was enough to indicate the official character, and that the blunder of writing “clerk” at the end of his name when nothing need have been written did not vitiate the affidavit.

2. **BILL OF EXCEPTIONS**—*When Necessary.*—When a plea is stricken from the files, and the motion and ruling of the court in that respect are not preserved in a bill of exceptions they are not part of the record, and can not come before this court for consideration.

Assumpsit, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

THOMAS J. WALSH, attorney for appellant.

SMITH, SHEDD, UNDERWOOD & HALL, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant argues one question and the appellee another, and they are both right.

The Superior Court struck out—if we may read the record—the plea of the appellant because to the affidavit of merits, the jurat, with the seal of a notary public of Cook county impressed, was signed by him “clerk.”

The seal was enough to indicate the official character, and besides, the courts take notice of that official character. *Chiniquy v. Catholic Bishop*, 41 Ill. 148; *Hertig v. People*, 159 Ill. 240; *Stricker v. Kubusky*, 35 Ill. App. 159.

The blunder of writing “clerk” at the end of his name, when nothing need have been written, did not vitiate the affidavit. *Kruse v. Wilson*, 79 Ill. 233, is not in point as to circumstances, but is upon the principle that irregularities in affidavits may be gotten over by matter extrinsic of the jurat.

Having thus shown that the appellant is right, we proceed to do the same by appellee.

There is no bill of exceptions. In *Whiting v. Fuller*, 22 Ill. 33, the Supreme Court said that none was necessary in a case like this, and afterward referred with approval to that case in *Williams v. Reynolds*, 86 Ill. 263.

In *Snell v. Trustees*, 58 Ill. 290, the court held that in the absence of a bill of exceptions, the ruling of the Circuit Court in striking a plea from the files was not before them for consideration; and said that they had frequently said so.

That case was cited and followed in *Reed v. Horne*, 73 Ill. 598, and *Harms v. Aufield*, 79 Ill. 257, and cited with approval in *James v. Dexter*, 113 Ill. 654, and *Chi., R. I. & P. Ry. v. Town of Calumet*, 151 Ill. 512.

Thus the latter and more numerous cases prevent us from reviewing the action of the court in striking out the plea, and the judgment is affirmed.

68 486
173 263

George W. Shannon et al. v. A. Wolf et al.

1. **MEMORANDUM.**—This case was before this court at a former term and is reported, with the title reversed, in 50 Ill. App. 396, which see for a statement of the case and for the reasons governing the decision herein.

Intervening Claim, in an attachment suit. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

PECK, MILLER & STARR, attorneys for appellants.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This case was here once before, and is reported, with the title reversed, in 50 Ill. App. 396.

Whitney & Starrette Co. v. O'Rourke.

The judgment then appealed from was there reversed and the cause remanded, and upon another trial in the Superior Court the judgment now appealed from was rendered in conformity with the opinion of this court as above reported.

Upon such second trial a jury was waived, and the cause was submitted to the court upon the same evidence, and no other, that was adduced upon the first trial, and that was before us upon the former appeal. The record now before us varies in no essential from that which was here before, except in the propositions of law that were submitted to the trial judge, and upon which he held in accordance with our former opinion.

Under such circumstances, it is only necessary for us to refer to our former statement of the case and opinion, as reported. The decision then given is, for us, the law of the case, and the judgment is affirmed.

68	487
173	177

Whitney & Starrette Company v. Thomas O'Rourke.

1. *NEGLIGENCE—Of Independent Contractor—Employer Not Liable for.*—The rule that a master is not liable for the negligence of an independent contractor is not affected by the fact that the contractor is paid the cost of the work and a per cent instead of a fixed price.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed, if remittitur to \$2,500 be entered, otherwise reversed and remanded. Opinion filed January 7, 1897.

KEEP & CROSS, attorneys for appellant.

EDWIN WHITE MOORE and RUSSELL WHITMAN, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant corporation was sued by the appellee to recover damages for an injury received by him by being hit

by a board that fell from a building in Chicago, where he was at work, in the spring of 1893, and the judgment for \$5,000, from which this appeal is prosecuted, was recovered.

The building was owned by L. Z. Leiter, and the appellant was erecting it for him under what is called a percentage contract, which means, as we understand it, that appellant was to furnish the material and labor, and was to be paid its cost with a percentage added.

Such an arrangement between appellant and Mr. Leiter, the owner, made the appellant an independent contractor, and exempted Leiter, as owner, from being civilly answerable for injuries arising from acts of negligence by appellant in the performance of the work. *Hale v. Johnson*, 80 Ill. 185; *Alexander v. Mandeville*, 33 Ill. App. 589.

The building, at the time the accident happened, had reached the height of about ten stories, and work upon it was being pushed at night as well as in the day time. It was about midnight when the board fell upon appellee, but where it came from was a question. No one saw it in the act of falling, until, at least, at the instant it struck appellee.

All the outside scaffolding had been removed, but there remained a board covering to a terra cotta sill course, or coping, that projected a foot or more from the wall of the building. Such covering was of boards laid lengthwise, two boards in width, and was for the purpose of protecting the coping from being chipped or broken by objects that might fall upon it.

The appellee and a fellow-laborer were standing upon the ground, engaged in hoisting lime in a barrel, by means of a rope and pulley, from the ground to the upper story of the building, and, at the time the board fell, the barrel was descending empty, and was at about the eighth story.

It was a fair conclusion for the jury to draw, from the evidence, that the board that struck the appellee fell from the coping, and was one of those that formed the covering to it. If it did fall from there, one contention of appellant is, that it was caused to fall by the negligence of appellee, or his co-servant, by negligently permitting the ropes with

which they were hoisting to catch upon it, and there was evidence that tended to show such to be the case, a witness for appellant testifying that appellee and his co-servant so stated just after the accident. On the other hand, there was evidence that from the distance—some four or five feet—at which the hoisting pulley was hung beyond the building line, that the perpendicular course of the ropes and barrel was entirely free from the coping and its board covering, and that neither the ropes nor the barrel were in any way connected with the falling of the board.

The appellee testified that Hogan, his co-servant, was working the rope at the time, and he was looking up and watching the barrel as it came down, in order to catch it and guide it into the lime box, and was positive that it did not hit against anything, and Hogan testified that he saw the barrel, from the time it started downwards, until the board fell, and that the barrel was then at about the ninth story, and did not strike anything.

An examination, made immediately after the accident, revealed the fact that a board was missing from the covering to the coping, and that another was hanging, and there was testimony that the board that hit appellee was of the same size and looked like the boards that remained on the coping; and there was also evidence tending to show that at some time before the accident the boards upon the coping had become loose by bricks falling upon them.

All these matters were, properly, for the consideration of the jury, and the verdict must be regarded as having settled them in favor of appellee in every essential requisite to sustain a right of recovery by him, and, except for some other ground, the verdict and judgment will have to stand.

It is very strenuously insisted that the appellants are not liable in any event; that they were not the employers of appellee, and hence that no duty of master to servant existed; that appellee was employed by and was under the control of a foreman, who was in charge under a superintendent of the building employed by the owner.

We need not repeat the evidence that is relied upon to

support such contention. It is not all one way, as is argued.

Both counts of the declaration alleged that the appellant employed the appellee, and the negligence that was charged was charged as being the negligence of the appellant and its agents, and there was evidence enough to support the verdict under either count of the declaration.

Criticism is made concerning the giving of some instructions and the refusal of others; but, upon a consideration of them as a whole, we are satisfied that no substantial error was committed in regard thereto.

That the damages awarded are excessive we think is clear. While appellee was hurt severely, we do not find in the evidence anything to justify so large an award, and, without repeating the evidence, we will merely say that unless the appellee shall, within ten days, enter a remittitur down to the sum of twenty-five hundred dollars, the judgment will be reversed on that ground, and the cause remanded for another trial.

Affirmed, if remittitur be entered down to \$2,500; otherwise, reversed and remanded.

Gustave A. Rau v. Herman J. Trumbull.

1. MEASURE OF DAMAGES—*Sale of Goods*.—The measure of damages for the breach of a contract of sale and delivery of goods is the difference between the contract price and the market price at the place fixed for delivery of such goods.

2. SALES—*Vendee's Right to Recovery for a Breach of Contract*.—Where a vendor fails to deliver goods according to his contract of sale the vendee is not bound to purchase other goods to supply the deficiency. He may recover for a breach of the contract without attempting to do so.

3. INSTRUCTIONS—*When Misleading*.—An instruction which informs the jury that a memorandum in evidence, as evidence of a contract, is not of itself a contract, is calculated to mislead the jury and should not be given.

Rau v. Trumbull.

Assumpsit, for breach of a contract of sale. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed January 21, 1897.

REMY & MANN, attorneys for appellant.

WILLIAM A. BALL and G. B. ANDREWS, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant sued the appellee to recover damages for the breach of an alleged contract for the sale by appellee to appellant of fifty tons of turkey feathers, and upon a trial by jury failed to recover, and judgment went against him for costs and he has appealed.

It was admitted that after a conversation held in appellee's place of business in Chicago between him and an agent of the appellant, who was a dealer in feathers in New York, the following paper was executed by appellee and delivered to said agent:

“CHICAGO, ILL., January 7, 1892.

Sold to G. Rau, about 50 tons full fleece turkey body feathers at $4\frac{3}{4}$ cts., delivered in New York. One car February, one car March, one car April, one car May, one car June and one car July, 1892, all subject to sight draft on B. L. All packed in strong burlap bags and weight guaranteed.

H. J. TRUMBULL & Co.”

On the one hand, it is claimed that such writing expressed an absolute contract of sale, and on the other, that it was only a memorandum of a proposition by appellee to sell, which required, and was understood to be subject to, acceptance by the appellant, the agent to whom it was delivered disclaiming authority to close a bargain at that time, and evidence in support of each contention was heard.

At the time the above writing was delivered to the agent, he, the agent, marked in ink, on another piece of paper, what

are called shipping directions, consisting of diamond shaped lines with a letter "R" in the middle, and left it with the appellee.

Upon the paper containing such shipping directions, the appellee, either at the same or some subsequent time, added in his own handwriting, in pencil, the following:

"Strong bags; one car turkey body feathers; shipment for February, 1892, March, April, May and June, 4½ delivered in New York; to be notified not later than the 20th of each month the time feathers are wanted. Failure to notify as above releases H. J. Trumbull & Co. from the trade. January 7, 1892."

It is in dispute when this pencil memorandum was written. Appellee testified that appellant's said agent saw him write it, and read it himself before he went away. On the contrary, the agent testified that he never saw it until it was exhibited to him while testifying.

The first quoted contract, or proposition, came to appellant's hands, and two days after its date he wrote and sent, as he testified, a letter to the appellee, a copy of which is as follows:

"NEW YORK, January 9, 1892.

Messrs. H. J. Trumbull & Co.

GENTLEMEN: I beg to confirm the order given you by Mr. A. Saloman for fifty tons full fleeced turkey body feathers at 4½ cents per lb., delivered New York, one car load each for the following months of 1892, February, March, April, May, June and July, all subject to sight draft on B/L, and packed in strong burlap bags. Weights guaranteed by you. Bales to be marked (R) and numbered from one up on each shipment.

It would be more convenient for me, if it is suitable to you, to remit on receipt of documents by my check. Please inform me if this will be acceptable.

I shall, for each shipment, inform you about two weeks ahead when the goods must be in New York.

Truly yours,
G. RAU."

Rau v. Trumbull.

The appellee denied the receipt of such letter. That the letter of that date was written, sent to and received by the appellee, is reasonably certain, as may be seen by the immediately following correspondence :

Letter from appellee :

“NEW YORK, January 13, 1892.

H. J. Trumbull & Co., Chicago, Ill.

GENTLEMEN: I beg to confirm my letter of the 9th inst., and return you herewith letter received not intended for me.

Yours truly,

G. RAU.”

Letter from appellee to appellant :

“CHICAGO, ILL., Jan. 15, '92.

G. Rau, Times Building, N. Y.

DEAR SIR: Yours of the 13th is to hand, which seems to be one on us. The letter intended for you was probably sent to some one else.

We meant to have wrote you at that time; inasmuch as we had made the agreement with Mr. Saloman, your agent, to sell you the feathers at 4 $\frac{1}{2}$ cents, delivered in New York, subject to sight draft as soon as shipped, the matter must stand that way.

Can not see that it makes any material difference to you, inasmuch as we guarantee the weights and quality of goods shipping.

When you are ready for a car, give us plenty of time, because we have to re-sack all here before shipping, which will probably take about ten days for each carload.

Yours truly,

H. TRUMBULL,

per M.”

It will be observed that in this letter of the appellee, dated January 15th, he refers to the agreement he had made with appellant's agent, of which appellant's letter of the 9th was a confirmation, and in replying particularly to the proposition of appellant to pay upon receipt of documents, probably meaning shipments or bills of lading, he declines to consent to such proposition, and says that the matter must

stand as agreed with the agent, "subject to sight draft as soon as shipped."

We regard this subsequent correspondence as entitled to prevail over the denial on the trial, by appellee, that he received the letter of January 9th.

Another still later letter of appellant also referred to his letter of January 9th, and we fail to find in any of the letters of the appellee any disavowal of the receipt of such letter. We are satisfied that the record, when considered altogether, shows conclusively that appellee did receive appellant's letter of January 9th. And, therefore, whether the memorandum of sale executed and delivered by appellee was absolute, or depended upon an acceptance by appellant, is out of the case, for if the latter be the fact, appellant's letter of January 9th was a complete acceptance of the contract.

The burden was upon the appellee to show that the pencil memorandum made by him upon the separate paper, containing shipping directions left with him by appellant's agent, was put there in the presence and knowledge of the agent at the same time the contract of sale was given, and was made for the purpose of expressing a condition upon which such contract was to be performed by appellee.

This the appellee has failed in doing. His testimony upon that point was denied in every essential by the agent, and no other person testified upon that point.

Furthermore, in none of the frequent correspondence that passed between the parties, concerning the carloads that were shipped by the appellant for February and March, was any mention whatever made by either party of any such condition as existing, although the correspondence makes frequent reference to shipments being made so as to meet certain European steamers upon which appellant apparently expected to reship the feathers abroad. It was not until in appellee's letter of April 13, 1892, that any mention was made of any understanding concerning shipments being requested by any particular day in a month, and it was then stated as "according to understanding," but without saying

what the understanding was. Such circumstance tended, to some extent, at least, to cast the preponderance and weight of evidence upon the side of the appellant, and certainly deprived appellee of all claim to a preponderance in his favor.

We might add that there was evidence in the case tending to show that in April an advance in the price of feathers in New York occurred, but we will not comment upon it.

Under such circumstances, the claim of appellee that the pencil memorandum made by him upon the paper containing the shipping directions was a part of the contract that was made with appellant's agent, must fall.

Among the instructions given for the appellee was the following:

"7. The jury are instructed that the memorandum in evidence as 'Plaintiff's Exhibit 1,' and signed H. J. Trumbull, is not of itself a contract. That to make it a binding contract an acceptance thereof by the plaintiff or some one duly authorized by him, was necessary."

By "Plaintiff's Exhibit 1," is meant the contract of sale executed by appellee.

To say the least, such instruction was calculated to grossly mislead the jury, and should not have been given in the form in which it was. The paper was evidence of a contract, though not necessarily conclusively so, but to tell the jury that it was no contract, was to mislead them into believing that it was not even evidence of one.

Another instruction, the second, given for appellee, was as follows:

"2. If the jury believe, from the evidence in the case, that the plaintiff might have obtained and purchased, delivered in New York, full fleeced turkey body feathers, at the several times when the plaintiff claims the same should have been delivered in New York by the defendant, and at a price not exceeding $4\frac{1}{2}$ cents per pound; then the jury are instructed that the plaintiff can not recover in this case."

Such instruction does not accurately state the law. It was equivalent to telling the jury that though the appellee had broken his contract, yet if appellant might have pur-

chased feathers in any market in the world, delivered in New York at the price contracted for by appellee, no recovery, not even nominal damages, could be had.

Such is not the law. Appellant was not bound to buy the feathers anywhere to be entitled to a recovery. *Summers v. Hibbard*, 153 Ill. 102.

Besides, the instruction omitted all reference to the quantity of feathers that might so be purchased. There was evidence tending to show that feathers became scarce as the season in question advanced. And an instruction that omitted all reference to the price at which feathers sufficient to satisfy the contract could be bought in New York was bad.

We do not mean to give sanction to all the other instructions by mentioning only these two. Some of them are, surely, close up to the line of error, but we will not take time to consider them. Their faults, if any, can be avoided by counsel on another trial. It was clearly shown that there was a market price in New York, during the months of April, May, June and July, 1892, for feathers of the kind bargained.

The measure of damages, if the appellant shall be entitled to recover more than nominal damages, is the difference between the contract price and the market value of such feathers in New York at the time they should have been delivered. *Trunkey v. Hedstrom*, 131 Ill. 204.

There being a market price for feathers in New York, the evidence of the market value of feathers in Chicago, during the month in question, was only admissible, if at all, for the purpose of contradicting or explaining, or aiding, appellant's evidence concerning the market value in New York, in view of the evidence tending to show that Chicago was the controlling market in such commodity.

And to have obviated the alleged error in admitting evidence of the Chicago price, an instruction that such evidence was competent, and should be considered only in aid of determining the true market value in New York, should have been formulated and given by the court.

The judgment will be reversed and the cause remanded for another trial.

Firemen's Insurance Company v. Lillie Horton.68 497
170* 258

1. APPELLATE COURT PRACTICE—*Presentation of Cases—Motions.*—A mere perfunctory motion, with mere perfunctory action thereon, is not such a presentation of a case in the trial court as entitles an appellant to the judgment of an Appellate Court upon the question of whether the court below erred in overruling a motion for a new trial.

Assumpsit, on a policy of insurance. Appeal from the Circuit Court of Cook County; the Hon. R. S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

STATEMENT OF THE CASE.

This was an action upon an insurance policy, to recover for a loss sustained to household goods by their destruction by fire on November 25, 1893.

The declaration contained two counts, to which the general issue was filed, and a notice of thirty-eight special matters of defense.

The jury rendered a verdict against the appellant for the sum \$1,522.95, upon which a judgment was rendered, and an appeal taken to this court.

At the time this policy was issued there was a chattel mortgage upon these household goods, or a portion of them, dated February 4, 1893, for \$31.60, upon the following described property: "Thirty-four yards, more or less, twelve yards and twenty-two yards rubber; thirty-two yards, more or less, red rug; one sofa bed, two gent's chairs, two parlor chairs, three Smyrna rugs, one comforter; eighteen yards, more or less, ingrain carpet."

At the time of the fire there was \$50 due upon this mortgage, which was outstanding and unreleased of record.

The policy provides that "if the interest of the assured in the property be other than an absolute fee simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property; or if there be a mortgage or other in-

cumbrance thereon, whether inquired about or not, it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void.

Mrs. Horton testified that at the time she was applied to by Charles E. Smith to insure these goods, she told him that there was a mortgage upon the goods, and that they were not hers until they were paid for, and that he replied, saying that was all right; that this occurred at the time she paid the premium and before the policy was delivered; that she never saw any one else concerning said insurance until after the fire; that he was the only party with whom she dealt; that the goods cost \$250, and that there was \$50 due on them at the time of the fire.

In an affidavit for continuance, the defendant stated "that he, the said Charles E. Smith, acted as the agent of the said Lillie Horton in obtaining the policy of insurance sued on in this case, and that the said Lillie Horton, at the time the policy sued on was obtained, represented and stated to said Smith that she owned the furniture insured or to be insured in said policy, free from incumbrance of any kind, with the exception of the piano, but that she did not own the piano, which was simply leased to her."

To avoid a continuance on account of the absence of said Smith, the attorneys for the plaintiff admitted that the said Charles E. Smith, if present, would testify to the alleged facts as stated and set forth in said affidavit.

Mrs. Horton says that she had met Mr. Smith many times before, and he had asked her to insure. She was then asked:

"Q. Had Mr. Smith ever done any business for you, or since that time? A. No.

Q. Was he at that time acting for you or for the company? A. He was soliciting insurance."

U. P. SMITH and WM. J. AMMEN, attorneys for appellant.

MOSES, PAM & KENNEDY, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The bill of exceptions in this case, as to what occurred upon the trial of the cause, contains the following :

"And the court further certifies that said defendant, by its solicitor or otherwise, did not appear in court and argue or urge said motion for a new trial, but assented to the overruling by the court of said written motion for a new trial, without argument of the points set forth therein, and without reading, or in any way presenting, said grounds for a new trial to the court, and the court did not hear or see said grounds or written motion for a new trial."

On December 1, 1896, a motion was made to amend the bill of exceptions by striking therefrom the clause in which it was stated that the defendant assented to the overruling of the motion for a new trial. The court thereupon amended said bill of exceptions, and the clause referred to, so as to read as follows :

"And the court further certifies that said defendant appeared by its solicitor, but said solicitor did not argue or offer to argue said motion for a new trial, or any of the points stated therein, as grounds therefor, nor were said points or grounds of said motion for a new trial formally read or stated, or shown to, or considered by the court, but said motion was overruled and denied by the court without any argument in behalf of the defendant in said cause."

Appellee objected to this amendment; and a bill of exceptions, containing such objections and exceptions, and certifying what was before the court at the time of such amendment, was made.

The court recites, in its bill of exceptions signed on December 1, 1896, that the order amending the said bill of exceptions "was made upon the inspection of the record, including the bill of exceptions, and that no other evidence was offered by either party or heard or considered by the court on the hearing of said motion, or in the making and entry of said order."

Whether the court could, upon an inspection of the rec-

ord that had been made at the March term, amend it at the December term, there not being in such record anything showing any mistake or misprision of the clerk, is a question we do not feel called upon to decide, as from an inspection of the record, as amended, it appears that there was no proper presentation of a motion for a new trial.

A mere perfunctory motion, with mere perfunctory action thereon, is not such a presentation as entitled an appellant to the judgment of an Appellate Court upon the question of whether the court below did not err in overruling such motion for a new trial. *Penn v. Oglesby*, 89 Ill. 110; *Alley v. Limbert*, 35 Ill. App. 592; *Smith v. Kimball*, 128 Ill. 583; *Clifford v. Drake*, 110 Ill. 135; *Brewer v. National Union Bldg. Assn.*, 64 Ill. App. 161.

The judgment of the Circuit Court affirmed.

Chicago General Street Railway Co. v. Joseph Capek.

1. **JUDGMENTS**—*When Not to Be Reversed.*—A judgment will not be reversed for a refusal to admit evidence of a thing of which no offer is made except by its name, and of which the record discloses nothing but the name.

2. **VERDICTS**—*Against the Weight of the Evidence.*—Where the verdict is against the decided weight and preponderance of the evidence, the judgment based upon it ought not to stand.

3. **PRESUMPTION**—*Of Ownership from the Use of Names.*—In the case of railways a presumption of ownership may arise from the fact that the name of the corporation is painted upon cars and locomotives, but such presumption is not conclusive.

4. **WITNESSES**—*Weight of Testimony.*—The testimony of witnesses who, from the nature of their connection with matters in controversy, have affirmative knowledge of such matters, standing unimpeached, is entitled to greater weight than those who speak only by way of inference.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed January 21, 1897.

Chicago General St. Ry. Co. v. Capek.

ENNIS & COBURN, attorneys for appellant.

BRANDT & HOFFMANN, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee was injured by falling, or being thrown, when attempting to alight from an electric car, which he claims was operated by the appellant, on April 29, 1894, and recovered a verdict for \$16,000, upon which the judgment was entered that is appealed from.

Speaking generally, the defense was that the appellant neither owned, operated or controlled the car, or the railway tracks upon which it ran, at the time the injury occurred, or at any time before or since; and the argument of appellant is mainly confined to the assigned error that evidence which would have tended to prove such fact was excluded from the jury.

The appellant was duly organized, on December 22, 1892, as a corporation for the purpose of constructing and operating horse, electric, cable and dummy street railways in Chicago, "and particularly, for the purchase of the franchise of the West and South Towns Street Railway Company," etc. All of appellant's witnesses who testified on that subject, testified explicitly that appellant never did any business, because it was unable to raise money for the purpose for which it was organized; that all that was ever done by the corporation in the way of business, was to attempt to raise funds to carry out the intention of its promoters to procure the franchise of the South and West Towns Company and operate the road of that company, but that it was unsuccessful in such attempt, and that it never ran, owned, operated, managed or controlled that or any other road, or street car line.

On the other hand, it was shown, by cross-examination of appellant's witnesses and by witnesses introduced in behalf of appellee, that the car on which appellee was traveling when injured, had the name of appellant painted on it, and

that stationery was, at the time of, and subsequent to the accident, used by whoever did operate the road, on which was printed the words, "Office of Chicago General St. Ry. Co., 971 West Twenty-second street, Chicago, —, 1893."

One or more employes of whichever company was in fact operating the road, testified, also, that they understood they were working for the appellant, and there was some other evidence that tended indirectly to show that the appellant was operating the road at the time of the injury.

All of the positive evidence of the ownership or operation of the road or car, by the appellant, was explained by officers of the appellant, who testified that in anticipation of the appellant acquiring the franchise of the Towns Company, and in the belief that such acquisition would become an accomplished fact, the car in question, and a few other cars, were painted with appellant's name on them, and that stationery was so prepared and sometimes used, and the court allowed all questions to appellant's witnesses as to the fact of whether the appellant ever acquired the franchise spoken of, or operated the road, to be answered, and their testimony was uniformly and explicitly in the negative.

At the time of the incorporation of the appellant, the road on which the accident occurred was owned and operated by the said West and South Towns Street Railway Company, and, as said, the appellant corporation was organized for the principal purpose of acquiring the franchise and operating the road of said Towns Company.

Several of appellant's witnesses, who were subscribers to the capital stock of appellant, and were officers of it, and testified that the appellant never acquired or operated the road of the Towns Company; testified, also, that the road was operated by the Towns Company at the time of the accident, and not by appellant.

The appellant lays much stress upon the refusal by the trial court to admit in evidence what was called, in the offers that were made, "The charter of the Chicago General Railway Company" and "the charter of the West and South Towns Railway Company, and the lease between it and the Chicago General Railway Company."

Upon such offer, the court in ruling said: "All that is necessary for you to do, is to show that the defendant was not running the road. It is not necessary for you to show who was."

We could not concur with the learned judge before whom the case was tried, in the correctness of the ruling so made by him, if the record corroborated the statement of offer that was made.

To an ordinary jury, the fact that was proved, and is not denied, that appellant's name was painted upon the car, and that stationery bearing appellant's name was in use at the office of whoever did operate the road, would tend very strongly to overcome mere negative oral testimony that appellant was not operating the road; and documentary proof that would show the incorporation of another company, which it had been testified was operating the road, and a lease between it and another corporation which had been chartered, would, in our opinion, have been competent and material evidence for the jury to consider in determining whether or not the appellant was operating the road when the injury occurred.

Such affirmative proof would have had a tendency to establish the negative fact that appellant was not operating the road, and because of such tendency, would have been proper.

But we may not consider that any error was committed in refusing the offers, for the reason that the statement by counsel of what was offered by him when he made the offer, as already quoted, is all that the bill of exceptions discloses. Whether what he called charters and a lease were in fact such, or were mere waste paper that had no connection whatever with the case, there is no way of determining from anything that is contained in the record.

A judgment may not be reversed for a refusal to admit evidence of a thing of which no offer is made except by its name, and of which the record discloses nothing but the name.

There was, however, without that evidence, such a

decided preponderance and weight of evidence that the appellant did not own or operate the road or car at any time, that the judgment ought not to stand.

While in the case of railways a presumption of ownership may arise from the fact that the name of the corporation is painted on cars or locomotives (*Ryan v. B. & O. R. Co.*, 60 Ill. App. 612), such a presumption, like others which are not in law conclusive, is subject to being rebutted, and we think was fairly rebutted in this case.

Several witnesses for appellant, who, from the very nature of their connection with the appellant corporation, and with the Towns Company, knew affirmatively what corporation owned and operated the line in question, testified positively and explicitly that the appellant did not own or operate it, and never did.

Such evidence, standing unimpeached, must necessarily be entitled to greater weight than that of others who spoke only by way of inference.

It is not pretended that there is anything in the case that binds the appellant by way of estoppel from denying its connection with the accident, unless it may be because of its name being painted on the car, and that we regard as having been satisfactorily explained.

The judgment of the Circuit Court will accordingly be reversed and the cause remanded.

68	504
72	417
72	480
170s	182
68	504
88	231

Charles E. Morrison, Executor, etc. v. A. H. Blackall et al.

John D. Ware v. Charles E. Morrison, Executor, etc., et al.

1. *PRACTICE—Waiver of Proof of Undisputed Allegations.*—A person representing himself to be the executor of one of the parties interested in a suit, filed a petition asking that he be made a party to the suit, as such executor, and an order was entered granting such petition. No objection was made to such order and no one questioned the truth of

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the statements of the petition as to the right of the petitioner to sue as executor. *Held*, that under the circumstances, no objection could be made on appeal, on the ground that formal proof was not made by such petitioner of his right to sue as such executor.

2. **LANDLORD AND TENANT—Assignment of Lease—Lessor's Right of Action on Covenants Running with the Land.**—Where a lessee assigns his whole estate, without reserving to himself a reversion therein, a privity of estate is at once created between his assignee and the original lessor, and the lessor has a right of action directly against the assignee on the covenants running with the land, one of which is to pay rent; and this rule holds although the rent reserved in the original lease is not the sum fixed by the assignment to be paid by the assignee.

3. **SAME—Rights and Liabilities of an Assignee or Receiver of the Lessee.**—Whether an assignee or receiver will become the assignee of, or bound to pay, rent provided in a lease held by the insolvent, is for the assignee or receiver to determine. But if he continues to remain in occupancy of the demised premises, beyond a reasonable time within which to make an election as to what he will do in that regard, he will be presumed to have elected to assume the lease, and will be bound to pay the rent provided thereby.

4. **SAME—Right of Landlord to Collect Rent of Assignee of Lease.**—Where a lessee assigns his whole estate, a privity of estate is at once created between his assignee and the original lessor, and a court of equity should order the payment of the rent to the original lessor, by a receiver of the assignee, there being no reason why it should pass through the hands of the lessee.

5. **SAME—Liability of Assignee of Lease to Landlord.**—Where a lessee assigns his whole estate, a privity of estate is at once created between his assignee and the original lessor, and the assignee is bound to see that the rent reserved in the lease is paid to the original lessor, and a payment to the lessee will not release him.

Intervening Petitions, against a receiver. Appeals from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Consolidated by order of the Appellate Court. Heard in this court at the October term, 1896. Affirmed in part, reversed in part, and remanded with directions. Opinion filed January 21, 1897.

STATEMENT OF THE CASE.

This is an appeal from an order entered by the Superior Court of Cook County in a receivership proceeding, wherein appellant Morrison and appellees A. H. Blackall & Son, and the Chicago Title & Trust Company, as assignee, were intervening petitioners. The order was entered April 28, 1895, and directed the payment of rent by the receiver, James W.

Nye, for the premises No. 121 South Clark street, Chicago, Illinois, as hereinafter set forth.

In the proceedings it appeared that on December 2, 1891, Ezekiel Morrison executed a lease to A. H. Blackall & Son for the first floor and basement of the premises known as number 121 South Clark street, Chicago, Illinois, at an annual rental of \$8,500, or \$708.33 per month, for a period of five years. Afterward, A. H. Blackall & Son leased the same premises to the Economical Drug Company, from May 1, 1892, to April 30, 1897, for a rental of \$10,000 per annum. Two thousand five hundred dollars was paid in cash by the Economical Drug Company to A. H. Blackall & Son on this lease, as security for the rent for February, March and April, A. D. 1897, being the last three months of the term of said lease, the lease providing, as to this, "that the same is to be forfeited to the parties of the first part as liquidated damages in case of the failure of the party of the second part to carry out the covenants and prompt payment of the rent reserved under this lease."

On July 12, 1893, James W. Nye was appointed by the Superior Court of Cook County receiver of the Economical Drug Company, on a bill filed by various judgment creditors.

The receiver was authorized by the Superior Court to continue the retail drug business of the Economical Drug Company, and paid rent to A. H. Blackall & Son at the rate of \$833.33 per month, or \$10,000 per year, until July, 1894. These payments were made on the express written agreement that James W. Nye was not to be held, either personally or as receiver of the Economical Drug Company, as assuming the burdens of the Blackall lease, except to pay rent under the order of the court for the occupancy of the premises. A short time prior to July, 1894, receiver Nye learned that A. H. Blackall & Son were insolvent and about to fail, and on the 23d day of July, 1894, A. H. Blackall & Son made a voluntary assignment, in the County Court of Cook County, to the Chicago Title & Trust Company, as assignee. Shortly thereafter the assignee filed a disclaimer of the Morrison lease in the

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County Court of Cook County. The receiver did not pay two checks of \$250 each, which had been given for the balance due for rent for July, 1894.

Proceedings were instituted by Morrison against the Blackalls, the Economical Drug Company, and the receiver, before a justice of the peace, in forcible detainer, to terminate the lease between Morrison and the Blackalls. About the same time petitions were filed in the Superior and County Courts on behalf of Morrison for the possession of the premises. On September 28, 1894, the Chicago Title & Trust Company, as assignee of A. H. Blackall & Son, filed its petition in the receivership proceeding, claiming rent from the receiver under the Blackall lease at the rate of \$10,000 a year. Subsequently the Chicago Title & Trust Company filed several amended and supplemental petitions, claiming accruing rents for various months. On the 9th day of April, 1895, Morrison and the Blackalls, by separate petitions, were made parties complainant to and adopted the petitions of the Chicago Title & Trust Company, so far as the matters therein set forth apply to their respective interests. On October 18, 1894, appellant John D. Ware, as a judgment creditor of the Economical Drug Company, filed his answer and cross-petition, setting up that the premises, 121 South Clark street, had greatly deteriorated, and that the rental value of \$10,000, or even \$8,500 a year, was excessive, and that the location had become undesirable, and that the receiver was willing to move out. A hearing was finally had in the Superior Court, and a decree entered on April 28, 1895, ordering the money to be paid as follows:

1. Five hundred dollars to be paid by the receiver to Moses, Pam. & Kennedy, as solicitors for the Chicago Title & Trust Company, assignee of A. H. Blackall & Son, for the back rent of July, 1894, for which checks had theretofore been issued by the receiver to A. H. Blackall & Son.

2. Four thousand five hundred and eighty-two dollars and thirty cents to be paid by the receiver to Moses, Pam. & Kennedy, as solicitors for A. H. Blackall & Son, for rent

for the months of August, September, October, November and December, 1894, and January, February, March, and up to April 15, 1895, for the premises, 121 South Clark street, at the rate of \$833.33 a month, or \$10,000 a year, being \$7,082.30, less the sum of \$2,500, the amount paid in advance by the Economical Drug Company to A. H. Blackall & Son. The petition of Charles E. Morrison, executor of the estate of Ezekiel Morrison, deceased, was dismissed for want of equity. From this order appeals were prayed by appellant Charles E. Morrison, as executor, and by appellant John D. Ware, judgment creditor.

JOHN C. SOOVEL, attorney for Charles E. Morrison, Ex'r, etc.

KEEP & CROSS, attorneys for John D. Ware.

MOSES, PAM & KENNEDY, attorneys for appellees Blackall & Son and Chicago Title & Trust Co., assignee.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellee James W. Nye, receiver, etc.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is urged that the appellant Charles E. Morrison, executor of the estate of Ezekiel Morrison, deceased, is not entitled to prosecute either of these appeals, because he did not make formal proof of the death of Ezekiel Morrison, and that he was his duly constituted executor.

Charles E. Morrison, as such executor, on the 9th of April, 1895, came into court, asking that he be made a party, as such executor, to the various petitions, already filed, of the Chicago Title & Trust Company, as assignee, and upon the same date A. H. and E. S. Blackall, appellees, came, asking that they be made parties complainant to the various petitions of the assignee; and thereupon an order of court was made, allowing said Morrison, as such executor, and A. H. and E. S. Blackall, to become parties to the proceeding,

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and to file their petitions therein. Thereafter, on the 28th of April, 1896, said Morrison, as such executor, filed an amended petition.

No objection appears to have been taken in the court below to the order allowing said Charles E. Morrison, as such executor, to become and be a party to the said proceedings, and throughout he, after his appearance, was treated as being such executor, no one questioning the truth of his representations in that regard.

The Chicago Title & Trust Company, in a petition by it filed in said matter, made, among others, the following allegation: "Petitioner further shows that said Ezekiel Morrison died testate, and that Charles E. Morrison is the executor of the last will and testament of said Ezekiel Morrison, and is acting as such."

Appellees A. H. and E. S. Blackall became parties to such petition, adopting the statements therein so far as applicable to their rights, which petition was offered in evidence by said Charles E. Morrison.

We think that under the circumstances, it is now too late to object that formal proof was not made by said Charles E. Morrison of the death of Ezekiel Morrison, and of the appointment of him, Charles, as executor.

Ezekiel Morrison leased to Blackall & Son the premises known as 121 South Clark street, at a rental of \$8,500 per annum, for a term ending April 30, 1897. Thereafter, on the 2d day of December, 1891, Blackall & Son leased the same premises to the Economical Drug Company, at a rental of \$10,000 per annum, for a term ending on the 30th day of April, 1897. The term of each of the leases expired at the same moment.

Where a lessee assigns his whole estate, without reserving to himself a reversion therein, a privity of estate is at once created between his assignee and the original lessor, and the lessor then has a right of action directly against the assignee on the covenants running with the land, one of which is that to pay rent, because such assignment of the entire term, there being no reversion in the assignor, creates a

privity of estate between the original lessor and the assignee to whom the entire estate formerly held by the assignor has passed, so that there then exists only two estates, that of the original lessor, as owner and entitled to reversion, and that of the assignee, who holds for a term as a tenant, being bound to restore the premises, not to his assignor, but to the original lessor. *Sexton v. Chicago Storage Co.*, 129 Ill. 318.

And this rule holds, although the rent reserved in the original lease is not the sum fixed by the assignment to be paid by the assignee.

Unless, therefore, there was in the lease made by Blackall & Son to the Economical Drug Company some provision preventing the operation of the before-mentioned rule of law, the effect of such lease was to create a privity of estate between Morrison and the Economical Drug Company, and render it liable to pay him rent.

Upon the hearing in the court below, this lease could not readily be found; counsel therefore stipulated as to the commencement and end of the respective terms created by each of said leases, and also as to the amount of rent reserved in each, and the fact of the payment of the sum of \$2,500 by the Economical Drug Company to Blackall & Son for the last three months of the term of said lease, with the condition as to the forfeiture of the same before mentioned.

Counsel were not able to agree that the foregoing were all the provisions of the lease, Mr. Moses, as counsel for A. H. Blackall & Son, stating: "There are the usual provisions in the lease which are current in Chicago, and which do not bear upon this controversy."

In the absence of any more definite agreement than this as to the further provisions of the lease, or in the absence of any evidence that there was any provision of the lease preventing the operation of the well known rule of law in case of the assignment by a lessee of his entire term, it must be presumed that there was no such provision. Such being the case, it follows that by the assignment by the Blackalls to the Economical Drug Company, a privity of estate was

created between Morrison and said company, and it became liable to pay him the rent which he was entitled to receive from Blackall & Son, namely, at the rate of \$8,500 per annum, payable monthly in advance.

During the course of the proceedings in the court below, Morrison, not obtaining his rent according to the terms of his lease, served notice that he had elected to determine the same, and began proceedings in forcible detainer, which proceedings were afterward abandoned.

The receiver of the Economical Drug Company, who was then in possession of the premises, might have acceded to the demand so made by Morrison, and yielded possession of the premises, and thus terminated all liability resting upon him personally, or upon the estate which he represented, to pay rent. Instead of doing this, he continued to remain, and it appears that Mr. Morrison, desiring to prosecute proceedings in forcible detainer, was resisted, both the County Court and the Superior Court refusing to give him leave to prosecute such suit in a justice court; whereupon Morrison abandoned his attempt, and permitted the receiver to remain in possession. Such abandonment, coupled with the receiver's refusal to yield, and continuance in possession, served to keep alive the lease, and amounted to a rescission, by mutual agreement, of the notice to terminate the lease and the attempt to get possession.

It is urged that the receiver, while in possession, was bound to pay, neither to Blackall & Son, or to Morrison, the rent provided in either of the leases, but is obligated for only a reasonable rent, which, it is insisted, was much less than the sum fixed in either lease; and what was said by this court in *Williard v. World's Fair Encampment Co.*, 59 Ill. App. 336, to the effect that in that case, the assignee was bound to pay a reasonable sum for the use and occupation of leased premises as a part of the expense of administration, is cited as authority for the above mentioned contention. What is there said was in reference to the facts of that case, and does not purport to be a general statement of the obligation resting upon either receivers or assignees

in respect to leases belonging to the estates which they represent.

We regard the rule to be, that a receiver or an assignee of an insolvent may accept the trust conferred upon him without becoming the assignee of any lease held by the insolvent. Whether such assignee or receiver will become the assignee of or bound to pay rent provided in a lease held by the insolvent, is for the assignee or receiver to determine. He has a right to elect what he will do in this regard, and, if the landlord take no action, a reasonable time within which to make such election. If he continue to remain in occupancy of the demised premises beyond such reasonable time, he will be presumed to have elected to accept the lease, and will be bound to pay the rent provided thereby. *Smith v. Goodman*, 149 Ill. 75.

In the present case, it appears that the receiver, upon his petition on the 12th of July, 1893, obtained from the court authority to carry on the business of the Economical Drug Company, at the leased premises, and under such order continued so to do up to April 15, 1895. The receiver, having thus elected to accept the lease, is bound to pay the rent provided for therein.

It is urged by Blackall & Son, that although it should be found that by their assignment to the Economical Drug Company, a privity of estate was created between Morrison and said company, and thus it became liable to pay Morrison rent, yet the order of the court should be that the receiver pay to Blackall & Son rent at the rate of \$8,500 per annum, and to Morrison at the rate of \$1,500 per annum; that the court is passing upon only the legal rights of the parties, and will not take notice of equitable rights or obligations, nor regard the fact that Blackall & Son are and were insolvent, so that they were unable to respond to the demand of Morrison upon them for rent.

It is quite true that in the main, the court below was passing upon the legal rights of the parties, yet the proceeding under which the parties were brought into court was an equitable one, and all the orders from which these ap-

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peals are prosecuted were orders made in chancery. In some respects the proceedings in the court below were quite informal, the evident intention of all the parties being that all the facts should be presented to the court, that therefrom the court might make such order as was proper in the premises. In the presentation of the appeals to this court the same disposition has been evinced.

A court of equity delights to do entire justice, and not by halves, and this justice it will, if possible, do straightforwardly, and not by indirection.

The obligation of the Economical Drug Company to pay rent to Morrison, under the privity of estate with him, is a legal one, and there is no reason why such payment should be ordered to be made through the hands of the Blackalls.

The \$2,500 paid by the Economical Drug Company to A. H. Blackall & Son, at the time its lease was made, was for the last three months of its term, and it was stipulated in the lease that such payment should be forfeited in case the Economical Drug Company did not fulfill the provisions of its lease; such sum of money, by such payment, became at once the property of A. H. Blackall & Son, but the payment was in no wise a discharge of any portion of the obligation of said Drug Company to Mr. Morrison; his right to the rent provided for in the lease by him made, and the obligation of the Economical Drug Company to pay it, remained the same. If, at the making of the lease by the Blackalls to the Drug Company, it had paid to them the rent for the entire term, such payment would not have affected the right of Morrison to recover from it the rent to which he was entitled under the lease by him made. In the present controversy, the rights of Morrison against Blackall & Son are not under consideration, as he is not attempting here to recover anything from them.

The order of the Superior Court as to the payment of \$500 to Moses, Pam & Kennedy, as solicitors for the assignee of A. H. Blackall & Son, is affirmed, and the Superior Court is directed to order the receiver to pay, also, interest at five per cent per annum on said \$500, from the 31st day

of July, 1894, to the date of said decree, said payment of interest to be made to Moses, Pam & Kennedy, as solicitors for the assignee of A. H. Blackall & Son.

The order dismissing the petition of Charles E. Morrison, executor, is reversed.

The order of the Superior Court as to the payment of \$4,582.30 to Moses, Pam & Kennedy, as solicitors for A. H. Blackall & Son, is reversed, and this cause is remanded to the Superior Court, with directions to order the receiver to pay to Charles E. Morrison, as executor of the estate of Ezekiel Morrison, deceased, the sum of \$708.33 for each of the months of August, September, October, November and December, 1894, and January, February and March, 1895, and at that rate per month up to April 15, 1895, together with interest thereon at the rate of five per cent per annum for each of said monthly payments, from the first of each of the respective months for which such payment is to be made; and to order the said receiver to pay to Moses, Pam & Kennedy, as solicitors for A. H. Blackall & Son, the sum of \$125 per month for the months of August, September, October, November and December, 1894, and January, February and March, 1895, and up to April 15, 1895, together with interest thereon at the rate of five per cent per annum from the first day of each of the respective months for which such payment is to be made.

Affirmed in part, and reversed and remanded in part, with directions.

**Firemen's Insurance Company v. James A. Hogan,
Collector, etc.**

1. **TAXES**—*On Stock and Franchise of Corporation—When not Enjoined as Arbitrary and Unreasonable.*—A corporation filed a bill to enjoin the collection of taxes on its franchise and capital stock. The bill alleged that the statement required by law had been prepared and delivered to the assessor, but did not show what were the particulars of such

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statement; it also claimed that the State board of equalization had disregarded such statement and made an arbitrary and unreasonable tax upon the property of the complainant. *Held*, that a comparison of the assets and liabilities of the corporation, as set forth in such statement, may have shown that the actual intrinsic value of the shares was very considerable, and that a demurrer to the bill was properly sustained.

BILL, to enjoin the collection of taxes. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

U. P. SMITH, attorney for appellant.

No appearance for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

February 19, 1896, the appellant filed in the Circuit Court a bill in chancery, the body of which is as follows:

"Your orator, the Firemen's Insurance Company, respectfully represents and shows unto your honors that it is a corporation duly organized and existing and doing business under the laws of Illinois, with its principal office located in Chicago, in the county of Cook and State of Illinois.

That it has been organized and doing business for twenty years last past, in conformity to the statutes and laws of Illinois, as a fire insurance company, with a capital stock originally of the par value of one hundred thousand dollars (\$100,000), which has since been increased to two hundred and fifty thousand dollars (\$250,000) paid up stock.

That since the date of its organization it has been constantly engaged in conducting and carrying on the business of fire insurance, for which it was organized, in the State of Illinois.

Your orator further shows unto your honors that it is the owner of a large amount of real estate in the State of Illinois, taken for indebtedness due and owing the company, and belonging to the company, and upon which it is assessed and pays taxes to the amount of from three to five thousand dollars (\$3,000 to \$5,000) a year.

That your orator is also the owner of certain office furniture and fixtures, and other personal property in its said office in Chicago, used and employed in connection with its said business, and that its entire capital is invested in real estate and other property upon which it pays taxes in the State of Illinois.

That the properly constituted officers of the city of Chicago have levied each year upon the personal property of your orator a just and fair amount of taxes to be paid by your orator upon such personal property so owned and used by it, and that your orator has always paid its full share of the taxes so levied against its personal property, and is now ready and willing, and now offers to pay to the collector of the town of South Chicago, in which said personal property is situated, and in which its said offices are situated, its full and just share of the amount of taxes levied by the assessor of the town of South Chicago, upon its personal property, for the year 1895, and your orator further shows that the assessor of the town of South Chicago levied and assessed against the personal property and assets of your orator a tax amounting in the aggregate, as increased by the State board of equalization of the State of Illinois, in the sum of four hundred one and eighty-six one-hundredths dollars (\$401.86) for the year 1895.

That at the time said assessor levied and assessed said tax upon your orator's personal property, as aforesaid, your orator made out and delivered to the assessor a sworn statement of the amount of its capital stock, setting forth particularly the name and location of the company, the amount of the capital stock of your orator authorized by law, the number of shares into which such capital stock was divided, the amount of the capital stock paid up, the market value of the shares of stock, and also the actual value of such shares, and stating that said shares had only a nominal value, either in the market or otherwise; the total amount of all the indebtedness of said company, except the indebtedness for current expenses, and excluding from said expenses the amount paid for the purchase or improvement of

said property; the assessed valuation of all its tangible property, including the value of its franchise, in conformity with such instructions and in form as prescribed by the auditor of public accounts for the State of Illinois.

Which said statement was delivered by your orator to said assessor, and was received and examined and fully considered by him and pronounced sufficient and satisfactory and in due form, in every respect as required by law to be made by your orator.

And said assessor, upon a full and thorough examination of the said statement and the facts therein stated and set forth, together with a full and careful examination of your orator's personal property, and upon the basis thereby furnished him by your orator, assessed your orator's personal property, including the value of your orator's capital stock and franchise, as set forth in said statement for taxation, and assessed upon the same the amount of taxes to be paid for the year 1895, at the sum above stated as equalized by the State board of equalization, which included the taxes upon your orator's other personal property, of every nature and description, liable for taxation in the State of Illinois for the year 1895.

That at the time said statement was so executed and delivered to said assessor, by your orator as aforesaid, it was properly sworn to and in proper form, to be by said assessor scheduled and returned by him to the county clerk, to be forwarded by said county clerk to the auditor of public accounts, to be laid by said auditor before the State board of equalization, as required by law.

Your orator further states upon information and belief, and charges the fact to be, that said assessor from some cause unknown to your orator, never scheduled and delivered said statement so made by your orator to the said county clerk, and that said county clerk, by reason thereof, never forwarded said statement to the auditor of public accounts, and said auditor never laid the same before the State board of equalization, as required by law, so that the State board of equalization never came into the possession

of or had in their possession for their examination the said statement so made and executed, and delivered by your orator to said assessor as aforesaid, as your orator is informed and believes, and charges to be true.

Your orator further states upon information and belief, and charges to be true, that the State board of equalization, without having before them the said statement, so made by your orator as aforesaid, and in the absence of any such statement, or any statement relative to your orator's personal property, either made by your orator or said assessor, and wrongfully and unlawfully, and without any information of any kind pertaining to your orator's personal property of any nature or description, proceeded arbitrarily and without having before them any properly authenticated information whatever, with regard to the amount or value of your orator's personal property liable for taxation, arbitrarily, wrongfully and unjustly increased the amount of your orator's tax upon its personal property for the year 1895, by the sum of thirteen hundred and fifty dollars and seventy-three cents (\$1,350.73), as the value of your orator's franchise, making the total tax payable by your orator upon its personal property in the town of South Chicago, as aforesaid, the sum of seventeen hundred and fifty-two dollars and fifty-nine cents (\$1,752.59), instead of the sum of four hundred and one dollars and eighty-six cents (\$401.86), the amount fixed upon by the assessor, and as increased by the State board of equalization, as your orator's personal tax for the year 1895, as above mentioned, and without any fault on the part of your orator, and in spite of the fact that your orator had in every respect fully complied with the law in listing its said personal property for taxation, as hereinbefore stated and set forth, and without any notice to your orator that any such increase of your orator's taxes or tax above your orator's capital stock and franchise was contemplated by the said State board of equalization, all of which your orator is informed and believes, and charges to be true.

Your orator further represents and shows unto your

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honors, that, on February 15, 1896, your orator tendered to James A. Hogan, the collector of the town of South Chicago, the sum of \$401.86, the amount fixed by the assessor as due and payable by your orator upon its personal property for taxes for the year 1895, as increased by the State board of equalization, which said last mentioned sum was received by Hogan as such collector, who stated to your orator at the time that he did not know as he could receive said sum in satisfaction of the personal property tax against your orator, but that he would keep the money and let your orator know in a day or two, and, if he could not receive and take said money in full satisfaction and payment of the personal property tax levied against your orator, and return said money to your orator within a day or two.

That on February 17, 1895, said collector Hogan, contrary to his promise, and without returning to your orator the said sum of \$401.86, and without giving your orator any notice of his intentions or of what he intended to do, or contemplated doing, caused your orator's bank account at the First National Bank of Chicago to be levied upon for the purpose of paying and satisfying the said sum of \$1,450.73 so arbitrarily and wrongfully and unjustly levied and assessed against your orator, as a tax upon its franchise by the said State board of equalization, as hereinbefore stated and set forth, and the said Hogan, as such collector, threatens and gives out that he intends to and will proceed forthwith, to cause an additional levy to be made upon your orator's property for the purpose of paying and satisfying said sum of \$1,350.73 so arbitrarily, wrongfully and unjustly levied and charged upon your orator by the State board of equalization as aforesaid; and your orator fears that unless enjoined by this honorable court, the said Hogan will proceed to make additional levy upon your orator's property for the purpose of collecting said unjust and illegal tax, and to enforce said levy already made, and otherwise harass and trouble your orator and tie up its property so that your orator can not manage and control

it, and thereby greatly damage your orator and interfere with its said business and property to the great and irreparable damage, wrong and injury to your orator.

Your orator further states and shows unto your honors that the franchise of your orator is of no real value, and is in no manner essential or important to your orator in the management of its said business, and contributes absolutely nothing towards your orator's income or profits, and is only used as a mere matter of convenience in conducting your orator's said business.

That a franchise equally good and valuable in every respect can be obtained from the secretary of state at any time for the sum of \$25, and this is the utmost sum at which said franchise could be valued for any purpose.

That the State board of equalization have not assessed the franchise of to exceed fifty per cent of the corporations doing business in the State of Illinois who are liable to such assessment, within the letter and spirit of the law, but have proceeded seemingly at random in making such assessment, thereby attempting to impose upon the few the payment of such tax, while others are not taxed at all, and thereby rendering every assessment of the franchise and capital stock of corporations made by said State board of equalization for the year 1895 illegal and void for want of uniformity, and a fraudulent imposition upon those companies upon whose capital stock or franchise said board has attempted to levy a tax, as in the case of your orator.

That said law, under which said State board of equalization has attempted to tax the capital stock or franchise of corporations in the State of Illinois, has for years remained upon the statute books of Illinois as a dead letter, and the State board of equalization has never before attempted to enforce the same, as your orator is informed and believes, and in the present instance said board has not conformed to the spirit or intent of said law, even if said law is still in force, but have attempted to enforce said law in an unconstitutional and illegal manner, by levying a tax upon the franchise of some corporations and omitting to impose a tax

upon others who are equally amenable to said law, and thereby attempting to impose and assess an ununiform and unjust capital stock or franchise tax upon other corporations doing business in the State of Illinois, without authority of law, and in violation of the constitution and law of the land.

But if said tax had been imposed or levied properly and in a uniform manner, the franchise of your orator has no value upon which to impose such tax, but is at most but a worthless right, and utterly devoid of all intrinsic or actual value to your orator, and wholly unlike many franchises for right of way, and other like franchises, where the right of franchise lays at the very foundation of, and must precede the prosecution of, the business contemplated, in which case a franchise is invested with and has some actual value which may be liable to taxation, but such is not the character of the franchise of your orator, which is utterly devoid of any element of value except as a mere matter of convenience in the mode of doing business; in all other respects it is a mere worthless right and possesses no intrinsic value of any kind outside the mere cost of obtaining it, and if liable to be taxed at all, such tax could only be imposed for a nominal sum, while in the present case the State board of equalization has based the tax levied upon your orator's franchise upon a valuation of \$15,000 as the value of such franchise, whereas, such franchise possesses no element of value of any kind to make it the subject of taxation under the constitution and laws of the State of Illinois.

Your orator further alleges that its business of underwriting in the State of Illinois under said franchise has proved unprofitable during the year 1895, and for years prior, and yet that company pays more taxes to the State of Illinois than other insurance companies in this State doing manifold more business than your orator; and that the said defendant has accepted from other corporations the tax as assessed against them by the local assessor and waived the payment of the tax herein complained of, assessed against said corporation respectively, on their franchise tax assessed by the State board of equalization; and your orator charges

that in practice and in the conduct of business by said defendant Hogan, and here and elsewhere in this State, such assessments by the State board have been ignored.

Your orator therefore prays—that forasmuch as at and by the strict rules of the common law it is remediless in the premises, and can only have relief in a court of equity, where such matters are cognizable and relievable—that a writ of injunction may be issued out of this honorable court directed to said James A. Hogan, the collector of the town of South Chicago, commanding and enjoining him and his officers, agents and servants, from interfering with your orator or any of its personal property or assets, and restraining and enjoining the said James A. Hogan, collector as aforesaid, perpetually, from collecting or attempting to collect the said sum of \$1,350.73 so illegally and wrongfully levied by the State board of equalization of the State of Illinois, against the capital stock, rights and franchise of your orator, and that your orator may have such other or further relief in the premises as to your honors shall seem meet; and that a summons may be issued in this cause in due form of law, directed to the said James A. Hogan, commanding him to appear and answer this, your orator's bill of complaint, and your orator will ever pray," etc.

The bill does not state what were the particulars of the statement delivered to the assessor; a comparison of its assets and liabilities, as stated therein, may have shown that the actual intrinsic value of the shares was very considerable.

And the claim for relief proceeds upon what, by law is impossible; viz.: that the assessor, and State board of equalization, had fixed the amount of taxes to be paid by the complainant upon its personal property and assets—a duty devolving upon other officials.

What is said by the Supreme Court in *LaSalle and Peru Horse and Dummy Ry. v. Donoghue*, 127 Ill. 27, and *Sterling Gas Co. v. Highby*, 134 Ill. 557, is very discouraging of applications like this, and the decree of the court below, sustaining a demurrer to and dismissing the bill of the appellant, is affirmed.

Edward Hines Lumber Co. v. Frank Ligas, for use, etc.

68	523
70	92
68	523
179	315

1. MASTER AND SERVANT—*Duty of Master to Protect Servant from Injury.*—A master is bound to the exercise of reasonable care with reference to all the appliances of his business, and is bound to protect his servants from injury therefrom by reason of latent or unseen defects so far as such care can do so; but the master does not insure his servant against injury, and is only chargeable for damage happening to his servant from defective appliances, when negligence can be properly imputed to him.

2. SAME—*Care to Avoid Injury Required of Servant.*—A servant is bound to see for himself such risks and hazards as are patent to observation, and is bound to exercise in the discovery of risks and hazards such opportunities for observation, skill and judgment as he possesses.

3. SAME—*Right of Servant to Presume that Master has Done his Duty.*—When the danger from a defective appliance is not patent, the servant has a right to presume that the master has discharged his duty, and that the appliances of the business are reasonably safe and free from hazard.

4. SAME—*Who are Fellow-Servants.*—In order to constitute the relation of fellow-servants between employes of a common master, their duties must be such as to bring them into habitual association, so that they may exercise a mutual influence upon each other, promotive of proper caution.

5. SAME—*The Duty to Furnish Safe Appliances a Personal Duty.*—The duty of the master to exercise reasonable care that the machinery, appliances and place to work which he supplies to his servants are reasonably safe, is a personal one, and he can not, by delegating it to another, absolve himself from liability for its non-performance.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed, January 21, 1897.

STATEMENT OF THE CASE.

For some time prior to and during the month of January, 1894, appellant was engaged in the wholesale and retail lumber business, and owned and operated extensive yards at the city of Chicago. In the conduct of that business appellant employed from two hundred to three hundred men in winter, and about five hundred men in summer. These

men were employed as laborers in and about appellant's yards, and were engaged in loading and unloading lumber from ships, cars and wagons, and in carting, piling and sorting lumber, and generally doing such work as was necessary to be done in the conduct of such a business.

Appellee entered appellant's employment in May, 1893, and continued therein until the latter part of January, 1894. During that time he was engaged as a laborer, doing generally whatever was to be done about the yards.

There were at appellant's yards about forty million feet of lumber, piled in piles containing from thirty thousand feet to eighty thousand feet each. Some of this lumber was piled by machinery, and some of it was piled by hand.

The course of proceeding was such that when lumber was being piled, boards or pieces of the lumber composing the pile were left either loose, so that they could be shoved out, or projecting from the side of the pile at certain distances from the ground, these boards or timbers being intended as supports for a platform or scaffold to be used in taking lumber from the pile.

When lumber is to be taken from a pile which is high enough to make the use of a scaffold necessary, one man goes on top of the pile and one on the scaffold. The scaffold man arranges the scaffold so that he can stand on it in handling the lumber which is passed down to him by the man on top of the pile. This is done by shoving out the supports, if they are not already shoved out, and placing across them two or three platform boards.

During the time appellee was in appellant's employ he worked a great deal as a scaffold man, but it does not appear that he had ever worked at piling lumber, and he testified that he had not.

On January 30, 1894, appellee was directed to assist another of the laborers in appellant's employ, in taking some lumber from a pile composed of boards one inch thick, twelve inches wide and sixteen feet long. Appellee climbed up the side of the pile and stepped upon one of the support boards, which at the time was projecting from the side of the pile. The board broke and appellee fell to the ground,

a distance of about fifteen feet, and received injuries, to recover for which he thereafter brought this action.

The declaration contains four counts, in each of which it is averred that appellant was in the possession of certain piles of lumber, upon one side of each of which appellant had caused to be constructed, at the height of twenty feet from the ground, a platform or scaffold three feet wide and fourteen feet long, to be used by appellant's employes to stand and be upon in handling lumber in and about said piles; that it was the duty of appellant to keep said platform strong, safe and secure, so that its employes would not be injured when on the same for the purpose aforesaid, and to furnish its employes a safe place to work; that appellant carelessly and negligently permitted said platform "to be old, rotten, weak, unsafe, insecure, dangerous and unfit for the purpose for which it was intended and used;" that appellee was then in the employ of appellant as a laborer, "whose duty it was to handle lumber of said defendant" (appellant); that appellant ordered appellee to go upon said platform and handle lumber; that appellee, not knowing of the insecurity of said platform, and without any fault or negligence on his part, and without any knowledge or reasonable means of knowledge on the part of appellee, of the insecure condition of said scaffold, in obedience to said order, went upon said platform, whereupon, without any fault or negligence on the part of appellee, but by and through the negligence of appellant, said platform broke and gave way and precipitated appellee upon the ground, whereby he was injured, etc.

To this declaration appellant filed a plea of general denial, and upon the issue thus formed the cause was tried before a court and jury, and resulted in a verdict for appellee for \$6,000.

Appellant moved for a new trial, whereupon the court suggested that appellee remit the sum of \$2,000 from the verdict returned by the jury, which appellee did. Thereupon the court overruled appellant's motion for a new trial, and entered judgment on the verdict for the sum of \$4,000. From that judgment this appeal is prosecuted.

As to the circumstances immediately attendant upon the accident, appellee testified :

“The pile of lumber was about thirty feet high; in the middle of the lumber pile there was a scaffold; the foreman from the dock took me there; this scaffold was about fifteen feet from the ground; the pile was thirty feet up to the top; in the middle of the pile there were three boards sticking out to the front; that is, in the middle of the pile from top to bottom; these boards stuck out about three feet; boards were twelve inches wide and one inch thick; one board at one end, and one in the middle, and one at the other end; I did not have anything to do with putting the boards there; the foreman took me there, and told me to go up there on that board; the foreman was John Oehme—that man there; he had been foreman all the time I was there; he gave me my orders, and told me what to do; I was wheeling lumber on hand carts; the foreman came to me and he took me to the pile, and he told me to go up there on that board.

Q. When he went up on that board, what, if anything, did he do with his hands? A. He told me and showed it to me; he brought me to that corner, and told me to go up there on that board (indicating and pointing); it was on the 30th day of January, 1894, about ten o'clock in the forenoon, when the foreman told me; I done as he told me to; I went up there on that board, and, as soon as I stepped on the board, the board was broken off and I fell down; I was climbing up on the corner of the pile; everybody climbs up on the pile in this way.

Q. When you got up as high as the board, and stood on it, what part of the board did you step on, with reference to the pile; how near to the pile did you step on the board? A. I stepped very close toward the pile; immediately when I stepped on it, it broke right off; it didn't take any time at all; I had never been on that scaffold before. There was nothing on the board except snow; it was covered with snow when I went up there; when the board broke I fell off.”

The foreman of whom appellee spoke, having prior to the trial been discharged by appellant, testified for appellee as

"A. I saw him on the scaffold, yes—told him to go on that scaffold.

Q. What did he do? A. I suppose he went up; I left there, and I was not gone a hundred feet when they called on me that he fell down.

Q. Then what did you do? A. I examined the board that was broken off; I went back there and we got some men there and carried him to the office; I saw on the end of the pile there was a knot inside of the board right across, right in the end of the pile; it was right, of course, inside; the knot was right close to the pile; on the top, where the knot went through, it was kind of rough, but on the bottom you could not see much about the knot at all, it did not go clear through—about an inch or two inches of the board; I guess it went ten inches; the knot was on the east side; on the west side you could not see it at all; it commenced on the east side and ran through the board for about ten inches.

Q. And did not show at all on the lower side, but was rough on the upper side, so it could be seen that there was a knot there? A. Yes, it could be seen on the upper side.

Q. You may state whether or not that was the board that you had asked this man to go upon? A. Yes, sir; I saw it come down; yes.

Q. That was the same one? A. I should think so; yes, sir.

Q. Were there any boards lengthwise on these three boards that stuck out on that pile at that time? A. Yes, there was."

W. B. KEEP, attorney for appellant; MORAN, KRAUS & MAYER, of counsel.

BRANDT & HOFFMAN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

A master is bound to the exercise of reasonable care with

reference to all the appliances of his business, and is bound to protect his servants from injury therefrom by reason of latent or unseen defects, so far as such care can do so, but the master is not an insurer of his servant against injury, and is only chargeable for damage happening to his servant from defective appliances when negligence can properly be imputed to him. The servant is bound to see for himself such risks and hazards as are patent to observation, and is bound to exercise, in the discovery of risks and hazards, such opportunities for observation, skill and judgment as he possesses; but when the danger from a defective appliance is not patent, the servant has a right to presume that the master has discharged his duty, and that the appliances of the business are reasonably safe and free from hazard. Wood on Master and Servant, p. 680.

The duty of the master to exercise reasonable care that the machinery, appliances and place to work which he supplies to the servant are reasonably safe, is a personal one, and he can not, by delegating it to another, absolve himself from liability for its non performance. Pullman Palace Car Co. v. Laack, 143 Ill. 242, 256.

Where a servant is injured by the negligence of a fellow-servant of the common master, the master is not liable. In this State in order that one servant should be the fellow-servant of another, their duties must be such as to bring them into habitual association, so that they may exercise a mutual influence upon each other, promotive of proper caution. Joliet Steel Co. v. Shields, 134 Ill. 209.

As in very many instances, and as regards corporations in all cases, the master, through the instrumentality of agents, supplies to the servant machinery, tools and appliances, and provides a place for him to work. Much discussion has arisen in cases of accidents arising from defective machinery or appliances, as to whether the agent of the master, by whom such machinery or appliance was supplied, was the fellow-servant of the person injured, it being insisted that if such was the case, the master should not be held liable. In many instances the court, upon its discussion of

the subject, has come to the conclusion that the agent supplying the machinery or appliance, was not a fellow-servant of the person injured, within the rule by which the relation of fellow-servants is determined.

Our attention has been called to the opinion of the court in *Frazier v. Red River Lumber Co.*, 45 Minn. 235, in which the court say, that in its opinion an important consideration, often overlooked, is whether the structure, appliance or instrument is one which has been furnished for work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform. If it be the latter, then, the court goes on to say, the master is not liable.

There is a certain incongruity in holding that the duty to exercise reasonable care in providing reasonably safe appliances and machinery is a personal one which can not be delegated, and at the same time holding that if the failure to exercise such reasonable care was the neglect of a fellow-servant of the party injured, then the master is not liable; and it seems more correct to say that agents who are charged with the duty of supplying safe machinery and appliances are not, when so doing, in the true sense, to be regarded as fellow-servants of those who are engaged in the use of the same.

This subject has received very intelligent and able consideration in *Northern Pacific Ry. Co. v. Herbert*, 116 U. S. 642, the conclusion reached being that where the employe is not guilty of contributory negligence, no irresponsibility for the injury to him caused by the defective condition of the machinery and instruments with which he is required to work should be admitted, except it could not have been known or guarded against by proper care and vigilance on the part of his employer.

This subject was also recently carefully considered in *Moynihan v. Hills Co.*, 146 Mass. 586, in which the court said: "In the absence of an express stipulation, the master impliedly agrees to provide and maintain reasonably safe and suitable machinery and appliances, as far as the exercise

of proper care on his part will secure them, and the servant agrees to assume all the ordinary risk of the business, and among them, the risk of injury from negligence of his fellow-servants. This obligation which the master assumes is personal, and appertains to him in his relation to the business as proprietor and in his relation to the servant as master, and it has been repeatedly held that he can not discharge it by delegating a performance of his duty to another, * * and if he employs agents or servants to represent him in the performance of this duty, they are, to that extent, agents or servants for whose conduct he is responsible. The very nature of the implied contract created by the hiring, whereby he undertakes to use proper care in always providing safe tools and appliances, is inconsistent with his delegation of the duty to a fellow-servant for whose negligence he is not to be responsible."

In *Lewis v. Seifert*, 116 Pa. St. 628-647, the court said: "There are some duties which the master owes to his servant, and from which he can not relieve himself except by performance. Thus, the master owes to every employe the duty of providing a reasonably safe place in which to work, and reasonably safe instruments, tools and machinery with which to work. This is a direct personal and absolute obligation, and while the master may delegate these duties to an agent, such agent stands in the place of his principal, and the latter is responsible for the acts of such agent." In *Wood on Master and Servant*, it is said that in an action like the present, the servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions:

1st. That the appliance was defective.

2d. That the master had notice thereof, or knowledge, or ought to have had.

3d. That the servant did not know of the defect, and had not means of knowing equal to those of the master. *Wood on Master and Servant*, Sec. 414; *Goldie v. Werner*, 151 Ill. 551.

In the present case, the jury has found all of these propositions for appellee.

As to the first, it is clear that the appliance was defective. Did the master have notice thereof?

The defect was one which could have been discovered upon examination with a view to ascertaining whether the board which broke was suitable for the purpose for which it was used.

Was the defect patent? Was it such that appellee, by the exercise of ordinary care for his own safety, in the discharge of his duty to the appellant, would have discovered?

As to this, it must be borne in mind that while the servant must take notice of things that are patent, he is not bound to make an examination for defects, but has a right to act upon the presumption that the master has discharged his duty to exercise reasonable care to see that the appliance is reasonably safe for the use to which it is to be put. Appellee was bound, not only to take notice of what was patent, but to exercise ordinary care for his own safety, while appellant was bound to exercise reasonable care in selecting the materials out of which the scaffold upon which appellee was told to go was constructed.

Upon an examination of the record, we can not say that the jury was wrong in finding, as it did, that the defect in the board which broke was not so patent that appellee should have taken notice of it, or that, when told to make use of the same, appellee failed to exercise ordinary care by not examining the board to see if it was defective. Under the rule that the servant has a right to presume that the master has discharged his duty of exercising reasonable care to see that the appliances supplied are reasonably safe for the use to which they are put, the servant is not bound to look for defects which are not patent to a man of his intelligence, knowledge and experience. *Goldie v. Werner*, 50 Ill. App. 297.

We can not say that the jury was wrong in refusing to find that the opportunity of appellee for ascertaining the defect in this board was equal to that of the appellant. The board was selected by appellant, put in its place to be used

as a part of the scaffold by his agents, who, when they did this, were not, in so doing, fellow-servants of appellee. Whether the men who constructed this platform were fellow-servants of appellee, as regards matters other than the supplying of machinery, appliances or place to work, is a question which, in this case, we do not think we are called upon to answer. Nor need we discuss what the liability of appellant would have been, had appellee been one of those by whom this scaffold was erected. In such case, it may be that appellee's opportunities for knowing the character of the material entering into the composition of this scaffold, would have been equal to those of appellant, and that thus having notice of the defect, he could not recover for an injury caused thereby. It seems clear that appellee did not assist in constructing this platform, and while it is true, as argued, that in the use thereof it was expected that boards would be laid along upon the projecting boards, one of which broke, we do not see that appellee, being told to climb up, as he did, could, in the first instance, have placed these other boards without, before that, resting his weight upon one of the projecting boards.

The jury was fairly instructed, so that we find in the record no error warranting a reversal of the judgment of the Superior Court, and it is affirmed.

Cleveland, C., C. and St. L. R. Co. v. Clifford Best.

1. EVIDENCE—*When Transactions of a Deceased Agent May be Proved.*—One party to a suit may testify as to the transactions of a deceased agent of the other party with persons not parties to the suit. It is only conversations and transactions between the party suing a deceased agent of the principal sued that are excluded.

2. SAME—*Readiness to Pay Fare.*—Where one of the issues in a suit against a railroad is whether the plaintiff was a passenger, to be carried for fare paid, or ready to be paid, he should be allowed to testify that he had money sufficient to pay his fare.

3. PASSENGERS—*Relationship of Carrier and Passengers—How created.*—One who takes a car in which passengers are carried, thereby

C., C., C. & St. L. R. Co. v. Best.

contracts an enforceable obligation to pay fare, and thus becomes entitled to the rights of a passenger.

4. *SAME—Not Chargeable With Notice of Rules of Carrier.*—A person dealing with a railroad company is not chargeable with notice of the orders and rules of the company, and if a caboose is used for the carriage of passengers, the company will be liable as a carrier of passengers to persons using it, although such use may be against its rules.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Mr. Justice GARY dissenting. Opinion filed January 21, 1897.

REMY & MANN, attorneys for appellants; JOHN T. DYE, of counsel.

WILLIAM STREET, attorney for appellee; JOHN WINANS and WILLIAM RUGER, of counsel.

MR. JUSTICE WATERMAN gave the following as his reasons for thinking that the judgment of the Superior Court should be affirmed.

This action was brought by appellee to recover damages for personal injuries received by him while, as he alleges, he was a passenger on a freight train of appellant.

It appears that appellee arrived in the city of Cincinnati, Ohio, on the morning of March 9, 1892, about 8 o'clock. He came to Cincinnati over the Queen and Crescent Railroad and left the train at the Union depot. This depot was used jointly by appellant, the Queen and Crescent and other roads. From Cincinnati appellee intended to go to Indianapolis. Regular passenger trains upon appellant's road left the Union depot on that day and arrived at Indianapolis at the following times: One at 8:30 A. M., arriving at Indianapolis at 11:50 A. M. One at 1:10 P. M., arriving at Indianapolis at 5 o'clock P. M. One at 7:30 P. M., arriving at 10:45 P. M. One at 8 P. M., arriving at 11:45 P. M. All of these trains were first-class through passenger trains. There was also a passenger train leaving at 6:10 A. M., which was a local train. Appellee was about the city of Cincinnati

until half past eleven or twelve o'clock, when he went to Riverside, a station three and eight-tenths miles from the Union depot, arriving there between eleven and twelve o'clock. He remained about the station until he went upon a freight train known as the second section of No. 55, which that day left Riverside at 3:50 P. M. He went into the caboose attached to that train, ten or fifteen minutes before it left for Indianapolis. The train was an ordinary freight train loaded with coal and miscellaneous merchandise. Attached to the freight train was what is known in railroad parlance as a "dinky" caboose; that is, a car about twenty feet long, having four wheels, and having boxes along the sides in which tools, lamps, links, pins and the general supplies of the train were carried. The lids of these boxes were cushioned with excelsior covered by oil cloth or canvas. There was a ladder or steps near the center of the caboose leading to a cupola upon the roof. The car also contained a stove. The conductor of the train stood facing appellee, near the car, when appellee entered it. While appellee was sitting in the car, two men and a woman came into the car, who rode two or three stations, about ten miles. These persons, he testified, gave the conductor pieces of pasteboard three or four inches long and about two inches wide, which looked like tickets, and which the conductor punched and put into his pocket. This testimony was subsequently stricken out on motion of appellant, because of the death of the conductor prior to the trial. The train, under ordinary circumstances, would have reached Indianapolis from three to six o'clock the next morning, the distance between Riverside and Indianapolis being one hundred and eight miles. When appellee entered the caboose, it was standing in the freight yards at Riverside, about one hundred yards from the station and a little beyond it, toward Indianapolis. In order to reach the car from the station, it was necessary for appellee to cross a public street or highway and go up four or five steps leading over a wall.

Appellant contends that it did not carry passengers on

its freight trains on any portion of its road between Cincinnati and Indianapolis, and had not done so for eight or ten years prior to March 9, 1893; that it carried no passengers in cabooses on any division of its road; that two freight trains carried passengers between Earl Park, Indiana, and Kankakee, Illinois, the former station being 200 miles from Cincinnati; that to these two trains regular passenger cars were attached; that there was a division of the business of the road into freight and passenger.

Appellee rode in the caboose from Riverside until the train reached a point near Brookfield, in the State of Indiana, where, between 4 and 5 o'clock A. M., of March 10th, while appellee was sleeping, another freight train of appellant going in the same direction, ran into the train on which he was riding, demolishing the caboose, instantly killing the conductor and brakeman, who were riding with the plaintiff in the caboose, and pinning appellee against the stove, whereby his right leg and left foot were severely burned, rendering necessary amputation of the leg and a portion of the foot. The collision took place in the midst of a severe snow storm. The train upon which appellee was riding had lost time, and had stopped at Brookfield to take water for the engine, and was just starting when the collision occurred.

There was evidence given that after appellee was removed from the wreck he made admissions to three persons; to one, that he knew he had no business on that train; to another, that he met the yard clerk at Riverside, who took him to dinner; that while he was at dinner he met the crew of the train, and the conductor agreed to carry him to Indianapolis; that he was "busted" in Cincinnati, and did not have any money; that to another, who asked him what he was doing on the train, he answered, "I was bumming my way." Appellee denied having so admitted or stated.

Conductors of freight trains were forbidden by the appellant to carry passengers on their trains. This prohibition was by verbal orders from the superintendent, and had been communicated to the conductor who was in charge of the train in question.

A verdict was rendered against the appellant in the sum of \$12,500 and judgment was given thereon.

Section 4 of chapter 51 of the statute of this State contains, *inter alia*, the following:

"And in every action, suit or proceeding, a party to the same, who has contracted with an agent of the adverse party, the agent having since died, shall not be a competent witness as to any conversation or transaction between himself and such agent, except where the conditions are such that under the provisions of sections 2 and 3 of this act he would have been permitted to testify if the deceased person had been a principal and not an agent."

In view of this statute, the court excluded from the consideration of the jury appellee's testimony concerning the reception by the conductor, from apparent passengers, of what appeared to be railroad tickets.

I think such evidence was admissible. It is only conversations and transactions between the party suing and a deceased agent of the principal sued that are excluded.

A party may testify as to transactions of a deceased agent with persons not parties to the suit.

Appellant says that among the issues presented by the pleadings was: "That the appellee was a passenger to be carried for fare paid, or ready to be paid."

Under this, appellee should have been permitted to answer the question put to him—"Did you have money sufficient to pay your fare?"—an objection to which was sustained by the court.

It is urged by appellant that there was no proof of payment of fare or readiness to pay it.

Appellee was, by the objection of appellant, prevented from testifying as to whether he had the ability, that is, the money, to pay.

But evidence of payment or readiness to pay was unnecessary.

One who takes passage in a car in which passengers are carried thereby contracts an enforceable obligation to pay fare, and thus becomes entitled to the rights of a passenger.

Shearman & Redfield on Negligence, 4th Ed., Vol. 2, Sec. 488.

The rule is declared in Hutchinson on Carriers, Sec. 565, as follows :

“ It is universally agreed that the payment of the fare, or price of the carriage, is not necessary to give rise to the liability. The carrier may demand its payment, if he chooses to do so, but if he permits the passenger to take his seat or to enter his vehicle as a passenger, without such requirement, the obligation to pay will stand for the actual payment, for the purpose of giving effect to the contract with all its obligations and duties. Taking his place in the carrier's conveyance, with the intention of being carried, creates an implied agreement upon the part of the passenger to pay when called upon, and puts him under a liability to the carrier, from which at once spring the reciprocal duty and responsibility of the carrier.”

To the same effect is the case of O. & M. Ry. Co. v. Muhling, 30 Ill. 23-24.

The evidence shows that the caboose car in which appellee rode was used for the carriage of passengers. This may have been in violation of appellant's orders and rules, but appellee knew nothing of them, and was not chargeable with notice of their existence.

Admitted as a passenger he became indebted for his fare; whether he discharged this debt the rules of law did not permit him to testify, and in the absence of evidence as to this, we must consider the case as if we knew that, not having been asked to pay, he did not; for that is the situation presented by the absence of testimony as to either a request for or actual payment.

Appellee not being permitted to testify as to conversation or transaction by him had with any agent of appellant, either before or after he entered the car, the case stands upon the situation presented by the admissible evidence. A contractual relation of passenger and carrier existed by virtue of the situation that is shown.

The jury have found the disputed questions of facts in

appellee's favor; the trial court has approved of the verdict, and we find no sufficient reason for reversing the conclusion reached by the court below.

The following instructions, given at the instance of the defendant, so far as it is concerned, fairly presented to the jury the law applicable to the defense offered by it:

"1. The burden of proof is on the plaintiff to prove by the greater weight of the evidence that the train upon which he was riding was a train upon which passengers were carried, or that it was adapted to the purpose of carrying passengers, and if the greater weight of the evidence does not show either one or the other of the above state of affairs to be true, the jury should find a verdict in favor of the defendant.

2. Statements made by the plaintiff after the injury are competent evidence in this case, and should be considered by the jury, along with all the other evidence, in arriving at their verdict.

3. The verdict of the jury must be based upon the evidence which has been permitted by the court to remain before the jury. The jury should not be in the least influenced by sympathy or prejudice; their verdict should be arrived at without any regard to the effect it may have upon the plaintiff or defendant; nor should it be influenced in any way by the real or supposed difference in the wealth of the parties.

4. While the law allows the plaintiff to be a witness in his own behalf, it also provides that the interest of the plaintiff in the result of the suit may be considered for the purpose of affecting his credibility.

5. There is no implied authority on the part of the conductor of a freight train to allow any one not connected with the railroad to ride on the same without paying fare, and if it is claimed that the conductor of the train upon which plaintiff was riding had authority in that regard, such authority must appear by a preponderance of the evidence, and the burden of proving such authority is upon the one who claims it existed."

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Judge Shepard taking no part, and Judge Gary being in favor of reversing the judgment of the court below and remanding the cause, the judgment is affirmed by operation of law.

MR. JUSTICE GARY.

I think there is nothing in the case to charge the appellant as a carrier of passengers.

The appellee had no ticket, did not take the train at a station, but climbed to it in a manner suspiciously clandestine, upon his own showing, without reference to what is in evidence as to his subsequent declarations.

Not being a competent witness to any consent by the conductor to carry him as a passenger, he is not competent as to any conduct of the conductor from which such consent could be implied; and even if such consent were proved, as it would be, beyond the authority of the conductor, the appellant would not be chargeable. No act of the appellant, inducing belief by the appellee that the train, though freight, was used for passengers, is in the case upon which to found an estoppel.

The case is a fraud.

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80	275

Manufacturers Paper Company et al. v. Robert Lindblom et al.

1. *BILLS OF REVIEW—Filing Without Leave of Court—Performance of the Original Decree.*—The defendants to a bill of review, by appearing and demurring to the bill, waive their right to claim that the bill was irregularly filed without leave of court, and that the performance of the original bill was not alleged. To raise either of such objections, they should, upon their first appearance, move the court to strike the bill from the files or to dismiss the suit.

2. *SAME—And Bills in the Nature of Bills of Review—Joinder of.*—A bill in equity may properly possess the characteristics both of a bill of review and of a bill in the nature of a bill of review. The purpose of such a bill, a review and reversal of a former decree, may be considered, irrespective of whether it be in name of one kind or the other, or par-

taking of the qualities of both. In this country it is a matter of little consequence what a bill is called.

3. *SAME—Restraining Orders.*—Where a bill is filed to review a decree for the payment of money, no stay of proceeding against the original decree should be granted, unless the money thereby ordered to be paid shall be brought into court to abide the result of the bill of review, or security be given for the performance of the original decree in case the bill of review be dismissed.

4. *SAME—Restraints upon the Enforcement of the Original Decree.*—It is improper to issue an injunction restraining proceeding under a decree upon the filing of a bill to review such decree; an order, staying proceedings on the decree until the hearing should be asked for, and if granted, is as effectual as an injunction and in accordance with proper practice upon bills of review.

5. *LACHES—As a Bar to an Injunction.*—For a party to a suit having notice, though irregular, that his demurrer would be called up on a certain day, to pay no attention to the notice nor to the order entered in pursuance of it, nor to any subsequent proceedings in the suit, nor to a decree entered therein until two years after the date of such notice, is such a showing of *laches* on his part as will prevent the issuance of an injunction restraining proceedings under the decree while a bill of review stands for hearing.

6. *SAME—As a Bar to a Bill of Review.*—*Laches* constitutes no bar to a pure bill of review brought within five years for error apparent upon the record; but where the ground for relief is newly discovered matter, or material facts which have occurred subsequently to the decree, then the question of *laches* in bringing forward such matters may, and should, be considered before the propriety of the decree is investigated.

Bill of Review.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1896. Reversed with directions. Opinion filed January 21, 1897.

DEFREES, BRACE & RITTER, attorneys for appellants.

JOHN S. COOK and H. T. HELM, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of injunction, granted upon a bill filed by the appellees.

The bill was to vacate and set aside a decree of the Circuit Court against the appellees in a cause wherein the appellants were complainants.

The grounds upon which the decree in the original suit is attacked are alleged error on the face of the decree, and because of the overruling of appellees' demurrer to the bill on which that decree is based, contrary to the rules of the Circuit Court, resulting in the final decree that is sought to be reviewed.

The rule of court claimed to have been violated was one that required calendars of contested motions to be made up on Friday of each week for the following Monday; and that notice of the placing of such motions upon such calendar must be served upon the opposing solicitors before four o'clock in the afternoon of the preceding Thursday, and must be delivered, with proof or acceptance of the service thereof, to the minute clerk of the court before two o'clock in the afternoon of such Friday.

It is alleged that no proper or sufficient notice, under said rule, was given to the appellees that their demurrer to the original bill would be called up for disposition on the day it was, in fact, disposed of; that the notice in that regard was served on Saturday, June 9, 1894, and that said demurrer was called up and overruled on Monday, June 11, 1894.

It is further alleged that on Friday, June 8, 1894, and Saturday, June 9, 1894, it was announced in the Chicago Daily Law Bulletin that the judge before whom said notice stated that said demurrer would be called up would, on said Monday, June 11, 1894, begin a general call of his docket, and that his contested motion calendar for said day would be continued for one week; that by an order of said Circuit Court, theretofore entered, it was provided that announcements of calls of court made in said paper would be "deemed sufficient to parties and their attorneys," and that it was customary to rely upon such announcements by both courts and counsel, and that "if any notice was or had been given to them to the effect that said demurrer would be called up for hearing on said day, said solicitors each regarded said special notification as superseded by the announcement contained in said Bulletin," and relied upon it, etc.; and that, in violation of such rule, the Circuit Court

permitted such demurrer to be called up and overruled without the knowledge of appellees or their solicitors, and it is alleged that neither the appellees nor their solicitors had any knowledge of the overruling of said demurrer, and of the subsequent proceedings in said cause, including the final decree therein, until on or about June 1, 1896; and it is charged that such proceedings constituted a fraud upon the appellees, for which they were entitled to relief by way of an injunction, which they obtained, against the enforcement of the original decree, and from the order granting which this appeal comes.

To the bill the appellants filed their general demurrer, which was overruled, and appellants were ruled to plead or answer within ten days, and, six days afterward, the injunction complained of was ordered.

The appellants, by appearing and demurring to the bill, waived their right to raise the question that the bill was irregularly filed without leave of court, and also the argued question, that performance of the decree was not alleged. By so demurring, they admitted that the bill was properly in court, and could not afterward raise an objection to the right of appellees to file the bill, or that performance was not alleged.

To raise either of such objections, the appellants, upon their first appearance, should have moved the court to strike the bill from the files, or to dismiss the suit. *Griggs v. Gear*, 3 Gilm. 2; *Bruschke v. North Chicago Schuetzen Verein*, 145 Ill. 433.

The two cited cases are instructive upon the proper practice to be pursued upon bills which have for their purpose the reviewing of a former decree, whether by a bill of review, or a bill in the nature of a bill of review, or a bill to impeach a former decree for fraud, by whatever name they may be called, and upon bills partaking of the several characteristics of each of such. See, also, *Elliott v. Balcom*, 11 Gray, 286.

The appellants expend considerable argument upon whether the bill in this case is a bill of review, or one in the

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nature of a bill of review, which we will not pursue. Probably the bill possesses the characteristics of both kinds of bills, and it may properly do so. Once properly in court, and all questions as to that being waived, as we have stated, the purpose of the bill, viz., a review and reversal of the former decree may be considered, irrespective of whether, in strictness, it be, in name, of one kind or the other, or partaking of both. In this country, it is a matter of little consequence what the bill is called, though important in England.

The only assigned error is the improvidence of the order granting an injunction against the appellants and the sheriff from enforcing the execution issued upon the decree sought to be reviewed, or in any other way attempting to collect or make the decree out of the appellees.

We are clear that the injunction order ought not to have been made.

The bill does not ask for a temporary injunction, but only for one upon final hearing, but if it did, injunction, as such, is not the proper interlocutory order in such cases.

An order staying proceedings on the decree until the hearing should have been applied for, and if granted, it would have been as effectual as an injunction, and in conformity with proper practice upon bills of review.

We do not find much precedent for the practice, but such was the motion made in *Williams v. Mellish*, 1 *Vernon*, 117, and the course pursued in *Burch v. Scott*, 1 *Bland's Ch. Rep. (Md.)* 112, and in our observation, is the usual one, although such orders, being interlocutory, do not often get into the reports. Analogous instances may frequently be seen at the circuit of staying proceedings upon original bills until cross-bills may be heard, one case of which may be found in *Curtis v. Williams*, 27 *Ill. App.* 311. Upon the filing of a bill of review the original case is brought into that one, and the question being whether the decree be reversed or not, such decree, for the time being and until the bill of review can be heard, stands subject to the control of the court. Hence the orderly practice is, upon proper

terms, to stay proceedings under such decree, instead of resorting to the extraordinary writ of injunction.

Instances may have occurred, but we have been cited to none, where the practice of granting an injunction under such circumstances has been followed, and, in the absence of precedent for such a practice, we are not inclined to broaden the field of usefulness of that much abused writ. Furthermore, the *laches* of appellees ought to be regarded as sufficient to bar him of relief by injunction. No matter how irregular the notice was that the demurrer would be called up on June 11, 1894, it is not claimed that no notice thereof was given.

When a party is once properly in court he is presumed to be always present, and to be cognizant of every step taken in his case until it is ended, unless for reasons that do not here exist. *Berkson v. The People*, 51 Ill. App. 102.

Now, for a party to a suit having notice, though irregular, that his demurrer would be called up on a certain day, to pay no attention to the notice nor to the order entered in pursuance of it, nor to any subsequent proceedings in the suit that ripened into a decree against him twenty-one months later, and to pay no attention to the decree itself until three months after it was entered, making in all an absolute neglect of his case for two years—lacking eleven days—and then ask for an injunction restraining proceedings upon the decree while his bill of review stands for hearing, is such a showing of *laches* on his part as does not appeal strongly to a court in which rests the discretion of granting such an order; and on that ground, as well as on the other one stated, the injunction should not have been granted.

It would seem that the Circuit Court, by overruling appellant's demurrer to the bill of review, must have considered the bill as making, on its face, a sufficient showing for a review of the former decree, and what we have said concerning the *laches* of appellees has no reference to the bill, considered simply as a bill of review, but only to the granting of the extraordinary remedy of injunction.

We understand that *laches* constitutes no bar to a pure bill of review brought within five years for error apparent upon the record. *Wellington v. Heermans*, 110 Ill. 564; *Pestel v. Primm*, 109 Ill. 353; *Bell v. Johnson*, 111 Ill. 374; *Chicago Building Society v. Haas*, 111 Ill. 176.

But where the ground of relief is newly discovered matter, or material facts which have occurred subsequent to the decree, or fraud practiced in obtaining the decree, then the question of *laches* in bringing forward such matters may well be considered, and should be inquired into before the propriety of the decree may be investigated. *Burch v. Scott*, 1 Gill & Johns. 393 (p. 425); *Banks v. Long*, 79 Ala. 319.

If the Circuit Court shall see fit to stay proceedings upon the former decree until the bill of review may be heard, and shall make a final decree thereon, according to its sense of law and justice, it will be soon enough for us to express an opinion on the law and merits of the original case, when, if ever, we are asked upon appeal from such final decree to do so.

But, the original decree being for the payment of money, we are of opinion no stay of proceedings, by way of restraining order against the original decree, should be granted, except the money thereby decreed to be paid shall be paid, or be brought into court to abide the result of the bill of review, or security be given for the performance of the original decree in case the bill of review be dismissed.

Such seems to be the authorized practice in cases of decrees for the payment of money (*Griggs v. Gear*, 3 Gil. 2; *Horner v. Zimmerman*, 45 Ill. 14; *Burch v. Scott*, 1 Bland (Md.), 112; same case in 1 Gil. & Johns. 393 (reversed upon another point); *Livingston v. Hubbs*, 3 Johns. Ch. Rep. 124; *Wiser v. Blachly*, 2 Johns. Ch. 488), and it seems to be founded in reason.

It does not seem as though a party, by filing a bill of review, should be put in a better position if he obtains a stay of proceedings than he would be in if he sued out a writ of error. No supersedeas would be granted upon a

writ of error without a bond to pay the decree, if affirmed. And a bill for review of a decree for payment of money ought not to be permitted to be a mere instrument for delay and vexation and for protracting litigation without, at least, a good bond.

The order now is, simply, that the order appealed from be reversed, with directions to the Circuit Court to dissolve the injunction.

Thomas Dwyer v. Ludwig Strenitz et al.

1. PRACTICE—*Assignment of Errors*.—A bill was dismissed for want of equity, and an injunction issued in pursuance thereof was dissolved. *Held*, that the propriety of the dismissal of the bill could not be considered under an assignment of error stating that "the court erred in dissolving the injunction."

2. APPELLATE COURT PRACTICE—*Technical Objections to Proof Not Ground for Reversal*.—A court of appeal may not shut its eyes entirely to what is common knowledge concerning attorney's fees allowable under the circumstances of a particular case, and if it is clear that an order in that respect is right, it will not reverse a decree and remand a cause for the purpose of removing technical objections to the proof.

Bill, for an injunction. Apoeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

KERR & BARR, attorneys for appellant.

RUFUS COPE and JOHNSON & McDANNOLD, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant filed his bill in equity to restrain the removal and re-location of a frame building, in violation of a city ordinance, upon a lot in the same block in which appellant owned property, and an injunction was granted

against the appellees, who were, respectively, the owner of the building and the house movers.

The appellees obtained a dissolution of the injunction for want of equity on the face of the bill, and an allowance to one defendant, the owner, of \$75, and to the other defendants, the house movers, of \$125, for their respective solicitor's fees in procuring such dissolution, and the bill was dismissed for want of equity.

The errors assigned by the appellant are:

"First. The court erred in dissolving the injunction.

Second. The court erred in overruling the exceptions to the master's report.

Third. The court erred in entering a decree in favor of the defendants for damages on the dissolution of the injunction."

No error is assigned because of the dismissal of the bill.

If the bill were properly dismissed for want of equity, and the decree in that respect is not complained of, then it follows that the first and second assigned errors must wholly fail, and, also, that the third assigned error must fail except as to the amounts that were allowed for solicitor's fees.

There is no question but that each party defendant, the house owner and the house movers, were properly entitled to be represented by separate solicitors, nor but that their services in the case for which the allowances were made, were exclusively directed to the matter of obtaining a dissolution of the injunction.

The master, to whom the question of damages under the injunction was referred to hear evidence and report, found and reported, upon the evidence adduced, that the defendants, the house movers, were entitled to be allowed \$200, and the other defendant, the owner, \$100, as their respective reasonable solicitor's fees (which the court cut down to the sums named in the decree), and disallowed all claims for other damages.

The appellant's brief says: "The proof, as found by the master, fails entirely to make a case for the allowance of

damages. There was no proof that the defendants, or either of them, paid, or became liable to pay, any sum for counsel fees, nor is there even proof that either of the counsel was employed on a *quantum meruit*."

Such statement challenges the correctness of the master's report, which is abstracted, as compared with the evidence upon which it is based, which is not abstracted. The abstract does state the effect of some of the evidence, as expressed by the master in drawing his conclusions, but does not show any of the evidence itself, and we can not, with no aid from the abstract, say what the truth about it is.

We will not, however, base our decision upon that ground. It appears from the bill that the validity and application of a city ordinance—a question of fraud in obtaining what are styled fictitious and forged signatures by adjacent property owners to a consent for the removal of the building, and in obtaining the permit for such removal—and the effect of a negative covenant contained in all conveyances of lots in said block of land, including the conveyance to the appellee Strenitz of the lot upon which it was proposed to remove and place said building—were all raised and involved by the bill, and were necessarily to be considered upon the motion to dissolve the injunction. Each of such questions is important, and by mere statement may be seen to require time and labor to properly elucidate.

Even if we were to regard as being well taken, the points made in the brief of appellant against the technical accuracy, in form, of the proof made before the master, we ought to be unwilling to reverse the decree and send the cause back for the mere purpose of removing such technical objections to proof.

It is apparent, from the questions involved and the amounts allowed, that, if any allowance were ever made, it would not be for less sums.

We may not shut our eyes entirely to what is common knowledge concerning fees allowable under such circumstances.

Here, no error having been assigned upon the propriety of dismissing the bill for want of equity, and such error, if any, being thereby waived, the question of whether the bill were properly dismissed, and the injunction properly dissolved, would not be considered upon another appeal.

Upon all questions before us, we discover no substantial error, and the decree will be affirmed.

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Sidney W. Stevens et al. v. Barney Newman et al.

1. **PRACTICE—Statement of an Offer to Prove.**—A mere statement of an offer to prove is not anything upon which a court is called upon to act. The witnesses should be called and questioned, or documentary evidence produced.

JUDGMENTS—Collateral Attack Upon.—A court will not interfere with the collection of a judgment by confession entered at a previous term, nor inquire into its fairness, upon the petition of an attaching creditor of the judgment debtor.

Petition, to impeach a judgment. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

STATEMENT OF THE CASE.

On July 9, 1896, appellants herein brought an assumpsit suit against Mary M. David, in the Superior Court of Cook County, and on the same day sued out an attachment writ in aid thereof for the sum of \$296.55, which writ was delivered to the sheriff of Cook county, and by him levied upon a certain stock of boots and shoes of the defendant, Mary M. David, subject, however, to a levy theretofore made by the sheriff, by virtue of an execution issuing out of the Superior Court upon a judgment by confession against said Mary M. David, and in favor of one Barney Newman, appellee herein.

On the same day appellants herein filed their petition in said Superior Court in their suit against said Mary M. David,

setting forth the beginning of their suit, the suing out of an attachment writ in aid thereof, and the prior levy by the sheriff as aforesaid. It was further represented to the court in the petition that the defendant, Mary M. David, had no other property subject to levy other than that already in the possession of the sheriff; that on the 29th day of June, 1896, a judgment by confession was entered in the Superior Court of Cook County against the defendant, Mary M. David, and in favor of appellee herein, Barney Newman, for the sum of \$3,038.50 and costs of suit.

That this judgment was entered upon three judgment notes purporting to have been executed by said David; that immediately upon the entry of said judgment an execution was sued out of the Superior Court and placed in the hands of the sheriff, and was by him levied upon all the property of the defendant; that the value of the property so levied upon by the sheriff was less than the actual amount of said judgment.

It was further represented in said petition that the sheriff had advertised all of the property levied upon, by virtue of the execution, for sale on July 10, 1896 (the day following the filing of the petition), at ten o'clock A. M.; that the sheriff was about to sell said property, and would sell said property, and pay to Barney Newman the proceeds realized from said sale, unless restrained by the court. Appellants prayed for an order upon the sheriff commanding him not to pay over the proceeds, or any part thereof, under any sale, to Barney Newman, until the further order of the court, but to retain in his possession, or to deposit with the clerk of said Superior Court, so much of the proceeds as would be sufficient to pay and satisfy appellants' said attachment, and appellants prayed for further relief. The petition was verified by Adolphus Bering.

Upon this petition the court entered an order upon the sheriff enjoining and restraining him from paying over the sum of \$233.50 out of the proceeds of any sale that might be made by him by virtue of the execution issued upon the judgment in favor of Barney Newman, and the sheriff was

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ordered and directed to retain said sum until the further order of the court.

Thereafter, on the 18th day of July, 1896, the matter coming on to be heard, petitioners, appellants here, offered in open court to prove the allegations of their petition, and offered to prove that the judgment by confession entered in favor of Barney Newman, and against Mary M. David, was fraudulent and void. The court, however, rejected said offer and dismissed the petition, and vacated the restraining order theretofore entered against the sheriff. It appears from said order that the judgment was entered at a term previous to the suing out of the attachment, and that but \$1,271 was realized on the execution. To that order appellants herein excepted, and were allowed an appeal. They now assign for error the action of the court below in rejecting the offer made to prove the judgment fraudulent, and in dismissing said petition and vacating said order restraining the sheriff from paying over said money to said Barney Newman, appellee here.

OSBORNE, GUERIN & SHRIMSKI, attorneys for appellants.

COWEN & HOUSEMAN, attorneys for appellee Barney Newman.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant's petition set forth merely the suing out by them of an attachment, without an allegation that the defendant thereto, Mary M. David, was indebted to them.

It was of the essence of appellants' right that they had a valid claim against Mary M. David.

The goods were about to be, and were, sold under a judgment entered at a term that had expired prior to the suing out of appellants' attachment.

In the case of *Brewster v. Riley*, 19 Ill. App. 581, it appeared that the goods in question were first seized upon an attachment writ. After this a judgment by confession was obtained and a levy thereunder made upon the same goods. The sheriff, and upon application, the court, was thus com-

pelled to determine to whom the proceeds of the goods should be paid, and the conflicting claimants had each the right to attack the *bona fide* of rival claims.

In the present case, the goods were not about to be, or neither were, sold on any claim of appellants. Appellants offered to prove the "allegations of their petition." This was insufficient. The witnesses should be called and questioned, or documentary evidence produced. A mere statement of an offer to prove is not anything upon which a court is called upon to act.

The order of the Superior Court is affirmed.

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Hilmar Stephany v. Gustav Castan and Louis Castan.

1. *CONTRACTS--Dependent Upon the Acts of Third Persons.*—When an obligation to pay money is dependent upon the action of a third person, over whom neither party to the obligation has control, such payment can not be exacted unless the specified act be performed.

Assumpsit, on the common counts. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 21, 1897.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellant.

SIGMUND ZEISLER, attorney for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The Columbian Moorish Palace Company was a corporation organized for the exhibition of wax figures and optical illusions at the World's Fair in Chicago.

Four persons were its promoters, viz., the appellant and Messrs. Zeisler, Hoffman and Hamburger.

The appellees, Castan Brothers, resided in Berlin, Germany, and were manufacturers and exhibitors of wax figures.

In August, 1892, a written agreement between Castan Brothers and the said Moorish Palace Company, was

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entered into, at Berlin, whereby the former sold to the latter for 183,260 reichmarks (equal to about \$44,000), certain articles then contained in the Panopticon conducted by Castan Brothers in Hamburg, Germany, and certain other articles to be manufactured by Castan Brothers, to be paid for as follows:

"Clause 6. The terms of payment are as follows: One-half of the above mentioned total purchase price must be deposited by October 1, 1892, at the Deutsche Bank, at Berlin, or at the National Bank of Illinois, at Chicago, and shall be paid over to Castan Brothers, on their delivery to the Columbian Moorish Palace Company of a document transferring to it the ownership in the articles situate at Hamburg and hereinabove mentioned. For the other half of the total purchase price, Castan Brothers agree to accept shares of the capital stock of the Columbian Moorish Palace Company, for their full nominal value, in the stead of payment. Said shares are to be deposited either at the Deutsche Bank, at Berlin, or at the National Bank of Illinois, at Chicago, for the benefit of Castan Brothers, with instructions to the banks, respectively, that the same are to be delivered to Castan Brothers as soon as the articles at Berlin and Hamburg are accepted by a trusted agent to be named by the company, and are delivered to the forwarding agent to be designated by the company, and the receipt of the forwarding agent shall serve to the respective banks as evidence of delivery. The said company herewith guarantees that the total capital stock issued by it is not larger than \$300,000."

In September, 1892, the appellant was in Saxony, and on the tenth of that month received a cablegram from his Chicago banker, as follows:

"CHICAGO, September 9, 1892.

Hilmar Stephany, Wittgen, Prussia, Saxony.

Bond subscribers refuse going on Moorish Palace unless everybody gives up half stock. Hamburger, Hoffman, Zisler consented. Cable authority likewise, otherwise everything lost.

WASMANSDORF."

Shortly after receiving the dispatch, the appellant went to Berlin to see Castan Brothers, and he testified that he there said to them, among other things: "I know you are deeply interested in this concern as contractors and stockholders, and that if I refuse to give up half of my stock, which I feel just now like doing, because I do not wish to be imposed upon, your investment, so far, which amounts to about 50,000 marks, will be lost to you. If I consent to give up half my stock, I must get some equivalent for it, because I have spent all my ready cash in the promotion of this enterprise, and I am now here without funds. Now, if I am compelled to give up half my stock, I want some compensation for it. Now, is it of sufficient interest to you to see the concern carried on? Then we will make an agreement. * * * You have a contract for 200,000 marks. You have so far invested in buying materials about 50,000 marks, or 60,000 marks, which will be a dead loss to you unless the contract is carried out, and it simply depends on my say so whether the company will go on or the whole thing go up in smoke."

The result of the interview and conversation is stated by appellant as follows; "In talking over the matter we ultimately agreed that they would pay me 5,000 marks if I would consent to cancel half of my stock. I had \$40,000 worth of stock at that time, face value."

The parties thereupon entered into the following writing:

"We have bound ourselves to pay Mr. Hilmar Stephany the sum of 5,000 marks, only under the condition that the contract with the Columbian Moorish Palace Company of Chicago, requiring payment of the first installment in cash in the beginning of October of this year, will be punctually kept. Mr. Hilmar Stephany binds himself to return to Castan Brothers the sum of 5,000 marks as soon as the stock of the above company reaches par.

HILMAR STEPHANY.

GEBRUEDER CASTAN.

September 12, 1892."

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And such writing formed the basis of the suit brought by appellant against the appellees, and from the judgment therein, in favor of the appellees, this appeal is prosecuted.

No part of the 5,000 marks mentioned in the writing of September 12, 1892, was ever paid.

In considering the effect of the writing between the parties, it is necessary to read it in connection with the contract between Castan Brothers and the Moorish Palace Company.

By the terms of that contract two payments were to be made, and only two, by the Palace Company: one of \$22,000 in cash (one-half of 183,260 reichmarks), by a deposit of that amount at the Deutsche Bank, in Berlin, or at the National Bank of Illinois, in Chicago, "by October 1, 1892;" and the other, of an equal amount, at its nominal (par) value, of the capital stock of the Palace Company, when the bargained goods should be accepted by an agent of the company.

By the terms of the writing between the parties to this suit, the appellees bound themselves to pay the 5,000 marks to the appellant, "only under the condition that the contract with the Columbian Moorish Palace Company of Chicago, requiring payment of the first installment in cash in the beginning of October of this year, will be punctually kept."

Such condition refers, manifestly, to the cash payment of \$22,000, to be deposited by the Palace Company, for the appellees, "by October 1, 1892," and its punctual payment was the essence of the promise to pay the 5,000 marks.

The inquiry that ensues is, was such deposit made? The deposit of \$22,000 was made by the Palace Company on October 6, 1892, but upon conditions variant from those provided by the contract between Castan Brothers and the Palace Company.

On September 13, 1892, the board of directors of the Palace Company adopted a resolution, without the sanction or knowledge, until subsequently, of Castan Brothers, as follows:

“Resolved, That the secretary be, and he is hereby, instructed to notify Castan Bros., at Berlin, that this company refuses to pay over to Castan Bros. the sum of \$22,000 or thereabouts, on October 1, 1892, but instead will deposit said sum of money, together with a certificate of 220 shares of the capital stock of this company, in the National Bank of Illinois, at Chicago. Such money and such certificate to be paid over and delivered, respectively, to said Castan Bros. upon the delivery by them of the articles purchased as described in the contract of August 18, 1892.”

Such resolution, or its effect, was under instructions to the secretary of the Palace Company, communicated to Castan Brothers, with something like a request for their consent to the modification of the contract, from a deposit as payment to one as security.

Probably after the letter of the secretary reached Castan Brothers, although not certainly so, they cabled to the Palace Company a dispatch, which was received on October 4th or 5th, 1892, as follows:

“Have ascertained deposit in National Bank of Illinois not made as promised in your letter. First make deposit, then talk about terms.”

Subsequent to the receipt of that cablegram, the Palace Company deposited, on October 6, 1892, in the National Bank of Illinois, \$22,000, upon the terms designated in its certificate of deposit, as follows:

“The National Bank of Illinois certifies that it has received this date, namely, 6th October, 1892, from the Columbian Moorish Palace Company, the sum of twenty-two thousand dollars, which sum is to be held by it as security for the payment to Castan Brothers of the sum of \$22,000, as soon as they shall have delivered to the forwarding agent, to be designated by the Columbian Moorish Palace Company, the articles purchased and ordered by the Columbian Moorish Palace Company of Castan Brothers, as per contract of August 18, 1892.”

It will be seen, by a comparison, that the terms recited in the certificate, are substantially like those in the resolu-

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tion of the directors of the Palace Company, concerning the money being as security for payment to Castan Brothers, and not as payment itself.

Apparently, Castan Brothers were paid one-half of the \$22,000 some time in November, 1892, and the balance in February, 1893.

We will not discuss the argument that the payment of \$22,000 to Castan Brothers depended upon the tender by them of a bill of sale of the articles contained in the Panopticon at Hamburg—or, in other words, that the tender of such bill of sale was a condition precedent to the payment being made, further than to say that before the time of payment had arrived the Palace Company had by resolution refused to make the deposit as a payment, and, further, that the Palace Company never appear to have made any such a claim. It is, also, doubtful if any tender of a bill of sale were otherwise necessary. It could have been no more than a formality at best. The first clause of the contract was, in itself, a bill of sale of the goods for future delivery, in January and February, 1893, and required nothing further than a delivery of the goods to vest a perfect title in possession to the bargained articles.

Nor is it necessary, in the view we take of the case, to consider the question of consideration for the agreement by Castan Brothers to pay appellant 5,000 marks.

We prefer to rest our decision upon the sole ground that, as between the appellant and Castan Brothers, the promise by the latter was but a conditional one, and that the condition was not performed.

The facts that we have stated need not be repeated.

Where an obligation to pay money is dependent upon the action of a third person, over whom neither party to the obligation has control, such payment can not be exacted unless the specified act be performed. *Miller v. Wilson*, 37 Ill. App. 399.

The condition here, that the Palace Company should punctually make the payment of \$22,000, goes to the whole promise by the appellees, and the promise fell with the failure of the condition.

The case of Cincinnati, S. & C. R. Co. v. Bensley, 51 Fed. Rep. 738, is in point, the opinion there being delivered by Mr. Justice Brown, now of the United States Supreme Court. While there, as here, some "fireside" equitable facts appear, they are not such as a court of law can enforce.

The appellant, as shown by his own testimony, drove a sharp bargain with the appellees under the cover of circumstances, or a situation to which he held the key, and he can not complain in law if the appellees have chosen, as they were entitled to do, to stand upon the letter of their promise.

The judgment of the Circuit Court in favor of the appellees was right. It will, therefore, be affirmed.

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Levi Z. Leiter v. Frank T. Kinnare, Adm'r.

1. NEGLIGENCE—*A Question for the Jury.*—The question as to whether a deceased person was guilty of negligence in exposing himself to danger is for the determination of the jury.

2. FELLOW-SERVANTS—*Foreman of Carpenters.*—A foreman of a gang of carpenters, and the carpenters composing the gang, are not fellow-servants, as to orders by him to them.

3. INSTRUCTIONS—*Designation of Next of Kin.*—In actions under Ch. 70, R. S., entitled "Injuries," it is not error to designate, in an instruction, the persons for whose benefit the action is brought as the father and mother of the deceased.

4. SAME—*Right to, Limited.*—The rule as to the limit of the right to ask for instructions announced in *Fisher v. Stevens*, 16 Ill. 397, applied.

5. DAMAGES—*\$5,000, When Excessive.*—In an action under Ch. 70, R. S., entitled "Injuries," the evidence showed that the deceased was thirty-three years of age, unmarried, and supported his parents, who were past seventy years of age; it was held, that a verdict for \$5,000 was excessive.

Trespass on the Case.—Death from negligence. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

JOHN A. POST and BARNUM, HUMPHREY & BARNUM, attorneys for appellant.

JESSE COX, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant, in February, 1892, had nearly finished his immense merchantile warehouse on State, Van Buren and Congress streets.

The carpenter work was being done by men directly employed by him.

One Chandler was foreman of a gang of carpenters, fourteen in number, among whom were two brothers named Elms. The building had so many elevators in it that two of them were numbers eleven and twelve, and the shaft of twelve had, at the story of the building to which this suit relates, a window opening into an alley, the window being at what would be called the back of the shaft, as the door of the elevator cab would be on the opposite side.

Chandler ordered the brothers to trim or case the frame of that window, and, as some of the evidence is, at the same time telling them that the elevators would not run that day.

They went to the work, and almost at once the younger brother, of whom the appellee is administrator, was killed by the counter weight of the elevator eleven coming down upon him.

A detailed description of the manner of the accident is unnecessary, for it was a question for the jury whether the deceased was negligent in exposing himself to danger.

There can be no doubt that the proximate cause of the accident was the running of the elevator; if it had stood still no injury of the same kind could have happened.

On this state of facts this suit is brought for the loss to the father and mother of Elms by his death.

The court, at the request of the appellee, instructed the jury as follows:

"1. The jury are instructed that if they find from the evidence that John Alfred Elms was employed by the defendant to do carpenter work upon a certain building then in course of construction by the defendant, and that in doing said work said Elms, on or about the 14th day of February, A. D. 1892, necessarily passed or stood between the ways of an elevator shaft, in which ways a heavy weight ran up and down as a counter balance to the elevator in said

shaft; and if the jury further believe from the evidence that just before going between said ways said Elms was informed by the foreman of the defendant in charge of said work that said elevator would not run during said day; and if the jury further find from the evidence, that said elevator was negligently permitted by the defendant, through his agents or agent in control thereof, to run on said day, and that in consequence thereof, said weight descended upon said Elms while he was between said ways and caused his death; and if the jury find from the evidence that said Elms was at and before the time of said injury using due and reasonable care to avoid injury, and that said injury was not caused by any fellow-workman of the said Elms, who was consociated with said Elms in the performance of his (said Elms') work as a carpenter; and if the jury find from the evidence that the father and mother of said Elms have sustained pecuniary loss by reason of the death of said Elms, then the jury should find for the plaintiff, in such sum as they shall find from the evidence will compensate said father and mother of the said John Alfred Elms for the pecuniary loss they have sustained by reason of the death of said Elms."

The criticism upon that instruction by the appellant is as follows:

"1st. It precludes the idea of the foreman or the elevator men being fellow-servants of the deceased.

2d. It makes the negligence of the foreman or the elevator men the negligence of the defendant.

3d. It specifically mentions the father and mother of deceased, and tells the jury that the father and mother of deceased have sustained pecuniary loss, thereby working on the sympathy of the jury, and making their verdict a matter of sympathy rather than a matter of right."

1st and 2d. As to orders by Chandler to the men in his gang, he was not a fellow-servant with them; and there is no more association shown between the deceased and the operators of the elevator than exists between the judges of this court and the elevator boys of the Ashland Block. *Illinois Central R. R. v. Swisher*, 61 Ill. App. 611; *Eggman v. E. St. Louis Con. Ry.*, 65 Ill. App. 345.

3d. We do not understand, but that is not the fault of the counsel of the appellant. We read the instruction that "if the jury find from the evidence;" and what less harmful, or more innocent, allusion could there be to the persons whose pecuniary loss was the subject of inquiry, than to call them father and mother?

The appellant asked twenty-five instructions, of which twenty-two were given, and the rule in *Fisher v. Stevens*, 16 Ill. 397, applies.

The testimony is that deceased was thirty-three years old, unmarried, and supported his parents, old people considerably past the Psalmist's limit.

One of the grounds for which a new trial was moved was that a man named Crowe attended the trial for several days—seemed much interested in it, and conversed often and loudly in the hearing of jurors and counsel as to the probable result. It is now too late to act upon a mere suspicion that he exerted some influence upon the jury.

Notwithstanding what I have said in *North Chicago Street R. R. v. Wrixon*, 51 Ill. App. 307, and *Bradley v. Sattler*, 54 Ill. App. 504, as to the finality of the verdict of the jury upon the amount of damages to be awarded for injuries resulting in death, I recognize the repeated decisions of this court upon questions not reviewable by the Supreme Court as settling the law and binding upon me.

Considering the age of the father and mother and the uncertainty of the benefit which the continuance in life of their son would have been to them, it is the judgment of the court that the damages, \$5,000, are excessive, and unless the appellee will, within ten days, remit from the judgment \$2,000, we will reverse the judgment, and remand the cause. If such remittitur be made, we will affirm for the residue—in either event at the cost of the appellee.

MR. JUSTICE WATERMAN.

I think the instruction commented upon should not have been given.

68	562
108a	40

First National Bank v. George D. Pease and Edwin B. Pease.

1. **BANKS AND BANKING—*Payment of Checks, Forged Indorsement.***—Where a check is drawn payable to the order of an actually existing person or corporation, if the order or indorsement of such payee is forged, payment by the bank is no acquittance.

2. **SAME—*Payment Otherwise than According to Directions.***—Where a depositor directs a payment to be made in a certain manner, a payment made otherwise than according to his directions is no discharge of the bank's obligation toward him.

Assumpsit, on the common counts. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

STATEMENT OF THE CASE.

In May, 1893, Willis P. Baker, representing himself to be the agent of his mother, Charlotte A. Baker, applied to appellees, who were engaged in the business of loans and real estate, for a loan for his mother, on property where she resided, known as No. 457 Englewood avenue, Chicago. Appellees agreed to let her have \$3,500, and made out the usual note, coupons and trust deed, dated May 8, 1893, which Willis P. Baker took away to be executed by his mother. When he brought them back they bore what purported to be the signature of Mrs. Baker, and the trust deed was accompanied by the usual certificate of acknowledgment, dated May 18, 1893, and made by Fred G. Thearle, Jr., a notary public. Thearle was a son-in-law of Mrs. Baker and lived in her house. The note and coupons were made, for convenience, to the order of Edith L. Pease, a sister of appellees, but shortly after the consummation of the loan were transferred by her to Henry Morse, the real lender.

For the proceeds of this second loan, less expenses, appellees drew two checks on appellant, the First National Bank of Chicago, both to the order of Charlotte A. Baker, one

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dated May 19, 1893, for \$1,000, and one dated May 27, 1893, for \$2,424.55. Willis P. Baker had conducted all the negotiations for this loan, brought in the abstracts, etc., and was the only person appellees dealt with in that connection, and to him, as the purported agent of his mother, they delivered said checks. He, Willis P., at once deposited the checks to the credit of his own personal account in the Northern Trust Company, the checks at the time of such deposit bearing what purported to be the indorsement thereon of the signature of Charlotte A. Baker. The Northern Trust Company credited said Willis with the amount of the checks, and the checks were thereupon paid in the usual way, through the Chicago Clearing House, by appellant, to said Northern Trust Company, and charged by appellant against appellees.

It was admitted on the trial that appellees, prior to the suit, had on deposit with appellant funds more than sufficient to cover the aggregate amount of said checks, but that all of said funds, over and above the amount of the checks, had been properly paid out by appellant on checks of appellees about which there was no question.

When the first interest coupon came due in November, 1893, appellees endeavored to collect the same of Mrs. Baker, but she refused to pay, and appellees, on pushing inquiry into the matter, were advised by Edward Maher, Mrs. Baker's attorney, that she, Mrs. Baker, did not know of any such loan.

Appellees then demanded of appellant the money paid on the checks, on the theory that Mrs. Baker's signature had been forged, and being unable to collect, began the action below.

On the trial two depositions of Mrs. Baker were admitted in evidence, one taken in the suit itself, and one taken in a suit brought by Mr. Morse, the owner of the notes, to foreclose the trust deed. To the latter neither appellant nor the Northern Trust Company was a party.

In the first, she testified, in substance, that she was the owner of the property covered by the trust deed; that she

never had any business transactions with the appellees, or either of them; that the indorsements "Charlotte A. Baker" on the checks were not in her handwriting or made by her authority; that she did not know in whose handwriting they were, did not see them written, and never received a penny of the proceeds of the checks; that the indorsements were wholly without her consent or knowledge; and that she first heard of the loan transaction in November, 1893, and never saw the checks until her deposition was taken in the foreclosure case (March 9, 1894); also that she did not in the years 1892 and 1893, at any time, talk with her son in regard to making a loan upon the property in question, and did not in the year 1893, at any time, contemplate making such loan, and that the subject of making such loan was not considered by her at any time during that year; also, that if her son indorsed her name on the checks it was without authority from her, and that he had no right to use her name; also, that said Willis died in January, 1894, and that during the five years before her son's death she talked over everything in regard to such real estate transactions as she had during that period with her son, and that in those cases the deeds were drawn under his and her direction jointly, and that she consulted him regularly and habitually in regard to her business transactions.

In the second deposition, she testified that the signatures to the note, coupons and trust deed were not in her handwriting or by her authority, and that she never appeared and acknowledged the trust deed before Mr. Thearle or any one else, and that she never assented or consented to said signatures, and that she never authorized her son to borrow money on the property, and was not aware that he was doing so, and that she had never, prior to May 19, 1893, permitted or authorized her son to indorse her name on checks made payable to her order.

When the second deposition was offered in evidence appellant objected to the introduction of any other depositions, and further objected to the deposition offered on the specific grounds that it was not binding upon appellant, having

been taken in the other (the foreclosure) case, and that the certificate of the notary could not be overcome by the testimony of the party acknowledging the deed, whereupon the court received the deposition subject to the objections, and admitted it in evidence subject thereto, to which action of the court appellant excepted. The court certifies, however, that it did not read or consider the same.

At the end of the trial appellant submitted to the court and requested it to hold seven propositions of law. The court refused so to do, whereupon appellant excepted. The court found against appellant, and judgment was rendered against appellant, whereupon an appeal to this court was prayed and perfected.

DUPEE, JUDAH, WILLARD & WOLF, attorneys for appellant.

BURTON & REICHMANN, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Whether improper evidence was admitted upon the trial of this cause, without a jury, is now immaterial. The court upon undisputed evidence, properly admissible, found that the signatures upon the checks were forgeries—that is, neither made or authorized by the payee.

There is no pretense that Mrs. Baker claimed either of these checks, or the proceeds thereof, or was entitled to either.

Stripped of all verbiage, the position of appellant is that the checks belonged to Mrs. Baker, *nolens volens*; that some notary having certified to her acknowledgment of a deed purporting to secure a loan on account of which these checks were given, Mrs. Baker is thus shown to be entitled to the checks, and can bring suit therefor, notwithstanding she had nothing to do with any of and repudiated the entire transaction.

The authorities cited as to the effect of a certificate of acknowledgment of a deed are in relation to questions of

title, and not with reference to the possession or ownership of checks or their proceeds.

Where a check is drawn payable to the order of an actually existing person or corporation, if the order or indorsement of such payee is forged, payment by the bank is no acquittance. The depositor has directed payment to be made in a certain manner; a payment made otherwise than according to his directions is no discharge of the bank's obligation towards him. *Morse on Banks and Banking*, Par. 474; *Daniel on Neg. Instruments*, Par. 1618.

The judgment of the Circuit Court is affirmed.

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• Delia Howard v. The American Boiler Company et al.

1. **MECHANIC'S LIENS**—*The Act of June 26, 1895, is Not Retroactive.*—The provisions of the mechanic's lien act of June 26, 1895, requiring that within ten days after a contract is made the owner shall require, and the contractor shall give, a verified statement of the names and addresses of all persons having sub-contracts, etc., are not retroactive so as to cover contracts made before the act went into force.

Bill, for an accounting. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed February 1, 1897.

STATEMENT OF THE CASE.

This was a bill filed by Delia Howard against appellees and others to compel a general settlement growing out of a contract made by Delia Howard with the A. J. Connor Company, for the construction of a steam heating plant in her flats, on the corner of Hamlin avenue and Lake street.

About the last part of April or the first part of May, 1895, Delia Howard made a contract with the A. J. Connor Company, by the terms of which that company agreed to put into the flat buildings of Mrs. Howard a steam heating plant, including boiler, radiators, etc., and Delia Howard

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agreed to pay to the A. J. Connor Company therefor the sum of \$1,700, from time to time as the work progressed. About the middle of May, 1895, the A. J. Connor Company commenced to construct the plant, and substantially completed it some time in August, 1895. Delia Howard, from time to time, paid to the A. J. Connor Company sums on account, making a total that was paid upon the contract of \$1,400, which still left in her hands, due on the contract, \$300, less, it is claimed, about \$25, which Mrs. Howard, it is alleged, paid to finish the job.

The American Boiler Company, the Kewanee Boiler Company and J. W. Byerly claimed to be sub-contractors under the A. J. Connor Company.

The court in its decree found that the American Boiler Company was entitled to a lien for \$700, and that J. W. Byerly was entitled to a lien for \$75, and decreed that Mrs. Howard should pay these sums, and that in default the property should be sold by the master to satisfy such several sums.

The main question in the case is as to whether, under the law, the payments which Mrs. Howard made on account of the contracts before the sub-contractors' notices were served, were rightfully made or not, and whether such payments should be deducted from the contract price or not.

The decree contains the following:

“The court further finds that Delia Howard paid to the A. J. Connor Company on July 20, 1895, \$400; on August 1, 1895, \$700; and on October 1, 1895, \$300; making a total of \$1,400 paid to the A. J. Connor Company, but the court holds that said payments were made in violation of section five of the mechanic's lien act, which went into force on the 1st day of July, 1895, because Delia Howard did not require a statement, and the A. J. Connor Company did not furnish a statement to Delia Howard in writing, under oath, in which the names and addresses of the parties having sub-contracts for specific portions of the work or materials were contained, and the court holds that without such requirement on the part of Delia Howard she could not, under the law, pay any portion of her contract price to said A. J.

Connor Company, and that such payments were not right-fully made as against the above named sub-contractors."

ARNOLD TRIPP, attorney for appellant.

WILLIAM R. BURLEIGH and A. P. PICHEREAU, attorneys for appellee J. W. Byerly.

WILLIAM R. BURLEIGH, attorney for appellee The American Boiler Co.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee claims, and the decree of the court in this case in effect is, that appellant, because of the provisions of the present mechanic's lien law, must pay twice for work done upon her building.

Such contention by appellee would be well founded if the present law had been in force when appellant contracted for the placing of heating apparatus in her dwelling. The law under consideration went into force June 26, 1895. The provisions of this law—requiring that within ten days after a contract is made, the owner shall require, and the contractor shall give, a verified statement of the names and addresses of all persons having sub-contracts, etc.—are not retroactive so as to cover contracts made in the previous April or May. It was impossible, after June 26, 1895, to have, within ten days of the making of the contract, April or May, 1895, given a verified statement of the names and addresses of persons having sub-contracts.

The law never requires impossibilities.

We do not think that claims for liens under the law in force prior to June 26, 1895, were made out.

The decree of the Superior Court is reversed and the cause remanded, with directions to order appellant to pay into court the sum of \$300 for the use of appellees; the same to be in full discharge of all claim of appellees for a lien on account of the said work by them respectively done upon appellant's said premises; such sum to be distributed *pro rata* among appellees.

Pardridge v. Cutler.

Charles W. Pardridge v. Alonzo J. Cutler.

68	569
69	32
68	569
168	504

68	569
s104	89
s104	90

1. CUSTOM AND USAGE—*Dealing With Reference to.*—A person who employs another to deal for him upon a board of trade must be held as knowing and intending that the business shall be conducted according to the usages and customs of such board, and this without reference to whether he in fact knows what the customs or rules of such board are.

2. GAMBLING—*Dealing in Grain.*—A sale of grain to be delivered in the future is valid. The statute only prohibits mere options to buy or sell, by which the parties are under no obligation to take or furnish the commodity at all, but may pay the difference in price and thus be discharged.

3. SAME—"Ringing up" Transactions on a Board of Trade.—The closing up of transactions on a board of trade for the purchase and sale of grain by setting off one trade against another—in the parlance of the Exchange, "ringing up"—does not make the transactions gambling contracts, and void under the statute.

4. SAME—*Dealing on a Board of Trade.*—If the understanding between persons dealing upon a board of trade is that nothing is to be received or delivered upon their trades, but that they are to be settled and disposed of by the mere payment of differences, then, under the statutes of this State, the transactions are gambling contracts, and are illegal and void, and can not form the basis for a recovery.

5. SAME—*Dealing on a Board of Trade—Secret Intention of One Party.*—Whatever may have been the secret intention and design of a party dealing with a broker on a board of trade, if the broker traded in such a manner that deliveries could have been compelled, and with the purpose and intent of making actual sales and purchases, and not mere hazards as to the rise and fall of the market, the dealings were not illegal, and a recovery may be had therefor.

6. SAME—*Burden of Proof.*—The burden of showing that a transaction is a gambling one is upon the party asserting it.

7. SAME—*A Question of Fact.*—Whether or not, in a given case, deals upon a board of trade are gambling transactions, is for the jury to decide in view of all the evidence, and, in the absence of error of law, their finding is conclusive.

8. SAME—*Evidence of.*—The fact that a person buying grain on a board of trade was not a dealer in grain; that he had no warehouse in which he could store it, mills in which it could be ground, or business in which it could be consumed; that he was a dry goods merchant, carrying on a business of which dealing in grain was no part, and that he had no idle money in his possession, may all be considered by a jury in determining whether the real purpose of the parties was to actually deal in grain, or merely to do that which the law pronounces gambling; but they are not conclusive.

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Pardridge v. Cutler.

Assumpsit, on the common counts. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

YOUNG, MAKEEL & BRADLEY, and SHOPE, MATHIS, BARRETT & ROGERS, attorneys for appellant.

A. B. JENKS, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This suit was an action of assumpsit brought by appellee, a broker doing a commission business on the Chicago Board of Trade, under the name of A. J. Cutler & Co., against appellant, for many years a dry goods merchant in, and resident of, the city of Chicago.

Appellant, in the year 1891, began to deal upon the board of trade, exclusively through the agency of appellee. Such exclusive dealing seems to have been brought about through the agency of one Nims, who was to receive one-half of the commissions earned by appellee in this business.

There is not entire agreement as to what the original arrangement between appellant and appellee was. There was testimony that appellee agreed to extend to appellant, in regard to such dealings, a large credit.

The fact is that appellee did give appellant credit to a large amount, and that in the course of the years during which the transactions out of which this suit has grown occurred, appellant, through the agency of appellee, made very many and large transactions for the purchase and sale of grain upon the Chicago Board of Trade; so that from December 1, 1891, to April 3, 1893, appellee purchased for appellant, for future delivery, 4,845,000 bushels of grain, and sold the same out before the time of delivery arrived; 220 of these transactions were purchases, and 229 were sales. Upon them all, the only grain actually delivered or tendered for delivery, was 10,000 bushels of corn, bought December 1, 1891.

Pardridge v. Cutler.

The trading of appellant upon the Chicago Board of Trade through the agency of appellee, continued until about April 1, 1893, when appellant had on hand, made through the agency of appellee, contracts for grain amounting to 770,000 bushels, at which time appellee called upon appellant to put up margins upon such trades. Appellant refused to deposit the margins so called for, on the ground that appellee had agreed to carry the trades without margins. Thereupon appellee, on April 3, 1893, against the protest of appellant, closed out all of his contracts then outstanding, at a loss of \$45,287.50.

Some time between September 6, 1892, and February 21, 1893, upon the request of appellee, appellant let him have various sums of money, amounting, all together, to \$23,000. This money, it is insisted, and was testified to by appellant and one Nims, was given to appellee as a loan to him, which loan appellant in this suit sought to set off and recover from appellee. Appellee insisted and testified that this \$23,000 was paid by appellant on account of what he was then owing.

Eminent counsel were employed in the case, and the trial was a long one, lasting some twelve days. The typewritten report of the testimony, there produced, fills over 1,200 pages. The jury found for the plaintiff, assessing his damages at the sum of \$54,062, upon which there was judgment.

Appellant insists that the arrangement between him and appellee was that there was to be extended to him, appellant, a credit of \$100,000, and that the closing out of the transactions when, according to appellee's own showing, such credit had not been exhausted and margins to such an extent were not required, was in violation of the arrangement between the parties, and that consequently appellee is not entitled to recover anything.

While we think it clear that there was an arrangement for an extension of a credit of \$5,000, we do not find in the evidence anything warranting us in overturning the verdict of the jury to the effect that there was no agreement for an extension of credit beyond the sum last named.

The suit in question was commenced June 17, 1893. On August 18, 1893, appellant signed the following note :

" \$62,000.

CHICAGO, ILLINOIS, August 18, 1893.

Five years after date, I promise to pay to the order of Edwin Pardridge, sixty-two thousand and no 1-100 dollars, payable at Chicago, Illinois, with interest at six per cent per annum, payable at the maturity of this note. Value received.

Providing, however, that the said Edwin Pardridge does not use intoxicating liquor in any form during the life of this note. Should he do so this note is null and void.

C. W. PARDRIDGE."

This note being at the trial produced by appellee, into whose hands it had come, it was insisted by appellant that it was in full satisfaction of the claim of appellee. It does not appear that the note is of any value, or that anything could be recovered by appellee thereon. The note is conditional, is not payable to appellee or his order, and has never been indorsed by Edwin Pardridge, to whom it is payable. The circumstances under which appellee received this note were given in evidence, and do not, in our judgment, amount to a taking of it by him in settlement or satisfaction of the claim for which this suit is brought.

As to whether the \$23,000 had by appellee from appellant was a loan or a payment upon account is immaterial, if the finding of the jury as to the nature of the transactions under consideration is to be sustained, as appellee has had credit for such \$23,000 upon the account presented by appellee. When this \$23,000 was given to appellee, appellant was continuing to deal on the board of trade through appellee, and apparently recognizing such transactions as legitimate ones for payments upon and commissions earned, under which he would be bound to appellee, and appellant was then apparently, on account of such dealings, largely indebted to appellee.

It seems most probable that such money was intended to be a payment upon account.

We think testimony as to the rules, regulations and usage

of the board of trade was properly admitted. Appellant having undertaken to deal upon the board of trade, knew that his transactions must there be conducted according to the rules, custom and usage of that place, and employing, as he did, appellee to act for him, he must be held as knowing and intending that the business would be conducted according to the usage and custom of that market, and this without reference to whether he in fact knew what the custom or rule of such place was. *Curtis v. Wright*, 40 Ill. App. 491; *Lonergan v. Stewart*, 55 Ill. 44, at 51; *Bailey v. Bensley*, 87 Ill. 556, at 559; *Perin v. Parker*, 126 Ill. 201, at 207; *Samuels v. Oliver*, 130 Ill. 73, at 79; *Bibb v. Allen*, 149 U. S. 481, at 489.

It was shown that all through these dealings, appellant's transactions were closed out by what is known as "ringing up," and this, it is said, was improper. "Ringing up," it appears, is nothing more or less than the setting off of one trade against another—a thing which occurs in great cities in mercantile transactions as to ninety-five per cent of the entire volume of business; that is to say, in great cities on purchases and sales of merchandise to the extent of \$100,000, in the settlement of the same, upon the average less than \$10,000 in money is actually paid, payments being made through checks upon bank, credit balances being set off against each other. The closing up of transactions on the board of trade for the purchase and sale of grain, by setting off one trade against another—in the parlance of the Exchange, "ringing up"—is necessarily no more illegal or improper than is the setting off of credit balances by merchants through checks on banks. True it is, as is urged by appellant, that thereby the identity of the transaction by him had upon the board was lost; that is to say, having purchased a thousand bushels of corn from A, and sold a thousand bushels of corn to B, if each transaction was closed out by a setting off of one against the other, he then had a contract for the delivery of grain with neither. Such result was for his convenience, and entailed upon him no loss, and such method of closing up transactions was a thing of which

he was, during all these years, well aware, without making complaint thereof. *Oldenhaw v. Knoles*, 4 Ill. App. 63; *Oldenhaw v. Knoles*, 6 Ill. App. 325.

Appellant insists that a large portion of the transactions had by him was mere "puts" and "calls." As to this, the evidence is contradictory, and such that we do not feel warranted in reversing the verdict of the jury upon it.

The complaint is made that the court in the presence and hearing of the jury made remarks prejudicial to appellant.

One of the unfortunate results of the statute of this State doing away with the common law method of instructing juries and imposing an artificial, illogical and unscientific method, is that the trial judge can hardly open his mouth in the presence of the jury without giving the defeated party an opportunity to urge that thereby the jury was in some way improperly influenced.

The remarks of the court complained of were made in the course of discussions which took place relative to the admissibility of evidence; they were not addressed to the jury; were only such as was natural and proper to an understanding of what the view of the court was, and we do not think the jury was influenced thereby.

If the understanding between appellant and appellee was that no grain was to be received or delivered upon these trades, but that they were to be settled and disposed of by the mere payment of differences, then, under the statute of this State, the transactions were gambling, illegal and void, on account of which no recovery can be had by appellee. If, on the other hand, whatever may have been the secret design and purpose of appellant, appellee, as a broker, purchased and sold this grain in such a manner that deliveries could have been compelled, and with the purpose and intent of making real, not fictitious, transactions, actual sales and purchases, and not mere hazards as to rise and fall, the buying and selling being neither of "puts" or "calls" or "options," but of an actual existing commodity, the dealings were not illegal, and recovery may be had therefor.

The burden of proof to show that the dealings were

gambling, was upon appellant; he it is who insists that during these years in all these dealings, involving so large a sum of money, he was engaged in what the law pronounces illegal, and upon which no recovery can be had; manifestly, it is for him to adduce evidence sustaining such contention. *Barnett v. Baxter*, 64 Ill. App. 544.

It was the duty of the jury to take into consideration not merely the transactions themselves and what was said by the respective parties, their agents and servants, in arranging for them, but also the circumstances and surroundings under which this trading began and was carried on, for, as the jury was properly instructed, the question is not merely what was said by appellant and appellee in regard to this matter, by which appellee might have known and understood that appellant intended to gamble, but it was the duty of the jury to inquire what there was of which appellee was bound to take notice concerning the intention and purpose of appellant, which he, appellee, was assisting in carrying out. Thus, the fact that the appellant was not a dealer in grain, that he had no warehouse in which he could store it, or ships or cars with which he could carry it to another market, mills in which it could be ground, or business in which it could be consumed; that he was a dry goods merchant, carrying on a business of which dealing in grain was no part; that at the outset he obtained a credit of a large sum, thus indicating, at least, that he had not in his possession idle money which he desired to invest in the purchase of grain, that he might reap a profit by a rise in the value thereof; and that if it were the case, nothing was made to appear to appellee by which he understood that appellant was already under obligations to deliver large quantities of grain to other parties, and for the purpose of fulfilling such contracts desired that purchases should be made upon the board of trade; from all these things appellee might have thought that appellant had no purpose to engage in legitimate dealing upon the board of trade, to speculate as one properly there may, buying grain and holding it for an advance, but that his real purpose and intention was merely

to do that which the law pronounces gambling. It is apparent that while any man may legitimately purchase grain upon the board of trade, and any broker may properly act as his agent, the thought of the broker as to what the actual intention of a party coming to him for assistance in so dealing is, may vary with reference to the parties who so approach him. The country dealer, purchasing grain from farmers who bring it to his warehouse, can hardly do so with safety unless contemporaneously therewith he sells upon the board of trade an equal amount, although at the time of such sale the grain is not there for delivery in accordance with the regulations of the mart.

And, with reference to orders from such dealer to sell, a broker may have no suspicion that anything other than a perfectly legitimate transaction is contemplated; but when a lawyer, a doctor, a minister of the gospel, a teacher or a dry goods merchant comes to a Chicago broker, ordering transactions for the purchase and sale upon the board of trade of grain for which he has no apparent use, the thought might cross the mind of the most unsuspicious of men that there was an intention not to actually buy and receive or sell and deliver, but to speculate in what is known as "differences," to do that which the statute of this State calls gambling, and if such transaction ordered by one of the class last mentioned, continuing through a series of years and running into millions of bushels, without in the sum of the dealings there having been in but one instance an actual transfer of grain, that for 10,000 bushels, the broker might conclude, and that long before the dealings had continued for such time or reached such magnitude, that his principal's real purpose was to speculate and deal in options, and not to do such trading as is legitimate and proper.

All this is, however, it is insisted, a question of fact for the determination of the jury, and with reference to this it must be borne in mind that it is not what appellant intended, but what he and appellee designed; that is to say, what appellant intended and what appellee knew, or had notice, was designed, and what he, appellee, with such notice or knowledge, willingly engaged in.

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Under the previous decisions of this and the Supreme Court, we do not feel at liberty to say that the transactions presented to us by the record of this case are such that the law pronounces them gambling, and that, as a matter of law, the jury should have been instructed to find for the defendant. We do not think that the Supreme Court of this State has gone to that extent in any case. If, therefore, the jury was properly instructed, its verdict upon this question is final. *Curtis v. Wright*, 40 Ill. App. 491; *Graham v. Sadlier*, 60 Ill. App. 522; *Davidson v. Colburn*, 54 Ill. App. 636.

We do not approve of the phraseology of all of the instructions; they are, however, to be considered, not singly, but as a whole; viewed in which way, we do not think that there was in respect to them anything of which appellant can properly complain. *Village of Sheridan v. Hibbard*, 119 Ill. 307; *Underwood v. Wolf*, 131 Ill. 425; *International Bank v. Ferris*, 118 Ill. 465.

Among other instructions given at the instance of the defendant was the following:

"If you believe from the evidence that the defendant, at the time the orders were given to the plaintiff for purchases and sales to be executed upon the Board of Trade of the city of Chicago, did not have the articles purported to be sold by him, nor have any use in his business for the articles purported to be purchased, and that he did not expect or intend to deliver the articles purported to be sold, or to receive and pay for the articles purported to be purchased, but simply intended to speculate upon the future market prices of the articles purported to be bought or sold, and to settle such purported purchases and sales by purported counter sales and purchases, and by the payment of differences in prices, then you are instructed that such an intention upon the part of the defendant would render such actions, as to him, gambling transactions and unlawful under the statute; and if you further believe from the evidence, that at the time the plaintiff undertook the performance of the defendant's orders, the plaintiff knew, or by the exer-

cise of ordinary prudence and care ought to have known, or had notice, actual or constructive, that the defendant did not have or expect to have the commodities purported by him to be sold, and did not expect to receive or pay for the commodities purported to be bought, but intended simply to speculate or wager upon the future prices of such commodities, and to settle all such contracts by the adjustment of differences in market prices, then such transactions, as between the plaintiff and defendant, were gambling transactions, and the plaintiff can not recover for moneys paid out on those transactions or for commissions on the same, but the defendant is entitled to recover back any money shown by the evidence to have been paid by him in the matter of such transactions."

This, together with the statement in other instructions, that the plaintiff was chargeable with such notice regarding defendant's intentions as would have been deduced from the defendant's actions by an ordinary man—that the form of the contract between appellant and appellee is not conclusive as to the true nature of the transactions; that that is to be determined by the real intention of the parties, and that if it was their intention, or that of the plaintiff, known to the defendant, that no grain or other commodity should be delivered or received by the defendant, but that the said transactions, as between the plaintiff and defendant, were to be, and in fact were, settled upon the differences alone in the market between the prices at which the grain was bought and sold, then such transactions were gambling transactions and void—together with what else is contained in the other eleven instructions given at the instance of the defendant, fairly presented the law of the case to the jury.

We do not mean to be understood as saying that this record is free from error; it would be strange, indeed, if it were; but we do think that question of fact involved in the case was fairly presented to the jury, and that no improper thing occurred during the trial by which it can be said appellant was prejudiced to that degree that the judgment of the court below should be reversed. We regard the case,

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as we have before said, as presenting clearly the question whether the circumstances of and surrounding this transaction are such that the law puts upon it the stamp of invalidity, and that therefore the jury should have been instructed to find for the defendant. Not feeling warranted in so holding, the judgment of the Circuit Court is affirmed.

Francis T. Murphy et al. v. Christian Kohlsaat et al.,
Trustees, etc.

68	579
107a	228
108a	346
109a	343
68	579
98	245

1. **MECHANICS' LIENS**—*Lien Attaches only to What is Used*.—A person who furnishes labor or materials to a building contractor, for use in constructing a building, takes the risk as to the use such labor or materials shall be put to, and a mechanic's lien attaches only for such part thereof as is actually used in such building.

2. **SAME**—*Proportionate Compensation for Partial Performance*.—A decree for a mechanic's lien found that it was "wholly impracticable to estimate the compensation for the part performed in proportion to the price stipulated for the whole." *Held*, that under such circumstances a decree for a lien should have been refused, as it is only for compensation in such proportion that the lien is given.

3. **SAME**—*Contracts Under Seal with Persons Other than the Owners*.—The husband of the owner of a lot entered into a contract under seal for the performance of services in the construction of a building on such lot. *Held*, that on an instrument under seal remedies are confined to the parties to it, and that no lien attached.

4. **ASSIGNMENT OF ERRORS**—*On Several Decrees Rendered in the Same Suit*.—It is not a proper assignment of error to say that all of the several decrees, in favor of different complainants in the same suit, are wrong.

Mechanic's Lien proceedings. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1896. Reversed in part and affirmed in part. Opinion filed February 1, 1897.

M. A. DEMPSEY and WILLIAMS, LINDEN, DEMPSEY & GOTT,
attorneys for appellants.

HOLLETT & TINSMAN, attorneys for appellees Gray, Tut-
hill & Co., William G. C. Lanpher and Wm. E. Barnard.

BULKLEY, GRAY & MORE, attorneys for appellee Compound Lumber Co.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This suit began in the Circuit Court as a petition by the Ketcham Lumber Company against Francis D. Rood and others for a mechanic's lien. A great many parties got into it; among others the appellants, as owners of the fee if all incumbrances were off.

The appellee above named has no interest in any question to be considered on this appeal.

It appears that the building, for the construction of which liens are claimed for labor and materials, was never finished; how far it stops short we do not find stated in the case.

The questions in the case are under the law as it stood before the revision of June 26, 1895.

When all parties had got their pleadings in the cause was referred to a master, who reported that the Compound Lumber Company, which had furnished mill work to the amount of \$3,559.33, was not entitled to any lien, because \$1,600, which had been paid to that company, more than paid for all that the company had furnished which had actually gone into the construction of the building. The court sustained exceptions to the report, not upon any difference between the court and the master as to the fact, but upon the ground that the "Compound Lumber Company fully completed its contract" and that the then owner "upon the delivery of said materials, took possession of the same and proceeded to incorporate the same into said building, which was then in course of construction."

There was no conflicting testimony as to how much of the material went into the construction of the building; what testimony there was upon the subject accorded with the finding of the master. It must have been the theory of the court that the Compound Lumber Company, having furnished the materials in compliance with its contract, incurred no risk as to the use they might be put to; a true theory as to the liability personally of the purchaser, but inapplicable to

Murphy v. Kohl Saat.

the question of lien upon the premises. Such lien attached only for what was annexed. Coleman's Mechanic's Lien, Sec. 105 *et seq.*

"Furnish labor or materials * * * in building," was the language of the statute.

Now the finding of the court that the then owner "proceeded to incorporate," gives no idea of how far she went, though there may be an implication as to the intent she had in starting. The lien given by the decree to that company is wrong.

The master reported in favor of Henry G. Sohns a lien for a balance of \$217. The court found that he had a contract for steam heating "for the lump sum of \$6,800;" "that the reasonable value of the materials furnished and labor performed was \$702.54;" that "he discontinued said work without any default on his part;" and that it was "wholly impracticable * * * to estimate the compensation for the part performed in proportion to the price stipulated for the whole."

Under Sec. 11 of the act as amended in 1891, such impracticability is a bar to a lien, for it is only for compensation in such proportion that the lien is given. Therefore the decree in favor of Sohns is wrong.

The premises on which liens are claimed were at the time of the various transactions owned by Annella Rood, wife of Francis D. The latter and David Walsh entered into a contract under seal, by which Walsh undertook the performance of services in the construction of the building, and Francis D. covenanted to pay Walsh for them. It is settled in this State that at law, on an instrument under seal, remedies are confined to the parties to it. *Moore v. House*, 64 Ill. 162; *Harms v. McCormick*, 30 Ill. App. 125, *contra*, reversed in 132 Ill. 104.

And in New York, where, under the code, law and equity are mingled, the same rule is held. *Briggs v. Partridge*, 64 N. Y. 357.

In Rhode Island, on the equity side of the court, also. *City of Providence v. Miller*, 11 R. I. 272.

The waiving of the point in *Campbell v. Jacobson*, 145 Ill. 389, is not authority to the contrary. The decree in favor of Walsh is therefore wrong.

It is only as to the three decrees we have mentioned that error is separately assigned; nor is it apparent that as to the others any substantial injustice is done. The assignments of error by which they are questioned are only that all of the several decrees are wrong, specifying some particulars why.

Each appellee is independent of every other. It is no good assignment of error to bunch them and say they are all wrong.

See the subject of assignment of errors treated under that title in 2 Ency. Pl. & Pr., 920.

The three decrees—one in favor of Compound Lumber Company, one in favor of Henry G. Sohns, and one in favor of David Walsh—are reversed.

The other decrees shown by the record are affirmed.

The whole costs here will be added together, and the appellant will pay one-half of them, and the Compound Lumber Company, Henry G. Sohns and David Walsh will each pay one-sixth of them. The form of the judgment to arrive at that result need not be stated here.

Reversed in part and affirmed in part.

Calumet Electric Street Railway Company v. Nettie E. Van Pelt, Adm'x, etc.

1. INSTRUCTIONS—*Care to be Proved by Persons Suing for Personal Injury Stated.*—An instruction which tells the jury that if the plaintiff was injured while in the exercise of ordinary care for her safety, and without fault or negligence on her part, she is entitled to recover, is not subject to criticism on the ground that it confines the necessity for due care to the time of the injury.

2. NEGLIGENCE—*A Question of Fact—Circumstances to be Considered.*—Negligence and care are questions of fact under the circumstances of the case; and the fact that a person who was injured was a

68	582
69	659
68	582
72	34
173	70
68	582
76	598
68	582
94	*342

Calumet Electric St. Ry. Co. v. Van Pelt.

young girl may be considered by the jury, and they may decide what regard should have been given to the uncertainty as to what such a child might rashly do under circumstances tending to frighten her.

3. *PRACTICE—Consideration of Motions for a New Trial.*—A written motion for a new trial, assigning a number of reasons why a new trial should be granted, was filed. Such motion was not shown to the court, and one of the reasons therein assigned was not mentioned in the argument or in any way brought to the attention of the court. *Held*, that the matters stated in such reason could not be assigned for error in a court of appeal.

Trespass on the Case. Death from negligent act. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 1, 1897.

JUDSON F. GOING and J. A. BURHANS, attorneys for appellant.

H. T. & L. HELM and H. W. MAGEE, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee is administratrix of her daughter, Edna Irene, who at the age of nine years was run over and killed by a car of the appellant.

The argument of the appellant in the opening brief is mainly upon the right to recover at all, under the circumstances of the accident, with allusion, however, to an instruction and a charge that the damages, \$5,000, assessed by the jury, are excessive.

The instruction and criticism of it are as follows:

"1. The court instructs the jury that if you believe from the evidence that Edna I. Van Pelt, while in the exercise of ordinary care for her safety, and without fault or negligence on her part, lost her life by and through the negligence of the defendant, as charged in the declaration, and that said Edna I. Van Pelt left her surviving next of kin, then you should find the defendant 'guilty,' and assess the plaintiff's damages at such sum as you believe from the evidence will be a fair and just compensation, based upon the pecuniary loss, if any, resulting from the death of the said

Edna I. Van Pelt, to her said next of kin, not exceeding the sum claimed in the declaration filed herein."

"In this instruction, the court confines the necessity for due care on the part of the deceased to the time of the injury, by implication, excluding the time preceding, during which the evidence strongly tends to show negligence on the deceased's part. This is error."

"Without fault or negligence on her part," excludes the construction placed by the appellant upon the instruction.

Upon the evidence the case is, that in the afternoon of July 29, 1892, three girls—the others being respectively aged eight and twelve years—were playing a game in Ninety-third street which they called "Follow the leader;" one running and the others chasing in file, and at intervals the leader fell to the rear, so that the next became leader.

The children saw the car approaching from the east, a very considerable distance, and started away from it, still playing their game. The other girls were in advance of deceased, and it is quite clear that the rules of the game were abandoned, and the girls all ran from the direction the car was coming. The street was macadamized, and the north rail of the track was ten feet from the curb. The other side of the curb was a ditch filled with water. In the direction the girls were running, obstructions, which the other girls passed, in the street, narrowed the way, in one place to three feet, in others to five feet, between the obstructions and track. It was obvious to the motorman that those children were running from the car; from what motive he had no means of knowing.

What thoughts agitated the child mind of the deceased can only be conjectured. When near the obstructions, she suddenly sprang to cross the track, so closely to the car that it was impossible to stop it, and death was the result.

The duty of the appellant to exercise ordinary care—"that degree of care which it is to be presumed an ordinarily careful and prudent person would exercise in the same relation and under the same circumstances" (Wolff Mfg. Co. v. Wilson, 46 Ill. App. 381)—to avoid injuring children upon the street can not be denied.

Calumet Electric St. Ry. Co. v. Van Pelt.

Her tender years and sex are to be taken into account in calculating the probable influence upon her fears, when the car, with loud ringing of the gong, was constantly gaining upon her, and the way in front so obstructed.

Negligence and care are questions of fact for a jury. That she was a young girl, running as fast as she could from the way the car was coming, and that her path would soon be so narrowed that she might well be afraid to enter it, were obvious facts. While the duty of the appellant was not increased toward the child by circumstances affecting her, her heedlessness in leaving a place of safety and going into danger may be excused by them.

The jury were justified in finding, in effect, that the car should not have been driven to pass her, as was the apparent purpose of the motorman, and that more regard should have been had to the uncertainty of what such a child would rashly do under surrounding circumstances. *Chicago W. D. Ry. v. Ryan*, 131 Ill. 474.

As to the amount of damages this record is in a peculiar shape.

A motion for a new trial was made, and among the grounds was: "12. The damages are excessive;" but the bill of exceptions states that "the foregoing motion based upon twelve grounds as above set forth, was filed in this court on the day upon which the said motion for a new trial was considered by the court, but on the argument and presentation of such motion on behalf of the defendant, there was no argument made to the court in support of any other than the following, viz.: that 'the verdict was contrary to law,' 'the verdict was contrary to the evidence,' and 'contrary to the law and the evidence,' 'and that there should have been no verdict for any amount in this case.'

Said written motion was not exhibited or shown to the court and there was no statement made to the court of the several points or grounds for new trial as set forth and exhibited upon the said motion, other than above stated."

Jones v. Jones, 71 Ill. 562, commented upon and distinguished in *Ottawa, etc., R. R. v. McMath*, 91 Ill. 104, we

regard as authority that the question of the amount of damages is not before us for review. The principle that "where the entry of a decree *pro forma* is the act of the parties and not of the court, no appeal will lie, because there has been no determination by the trial court" (2 Ency. Pl. & Pr. 100) applies with equal force to an error assigned upon a question that the party did not present for decision to the trial court. Objections are not to be raised for the first time in a court of review. *McCartney v. Loomis*, 61 Ill. App. 364; *Westphal v. Sipe*, 62 Ill. App. 111.

The judgment is affirmed.

MR. JUSTICE WATERMAN.

I regard the right of the appellee to recover in this case as extremely doubtful.

One riding, driving or walking along a street, or other public place, is not obliged to be all the while on his guard against sudden, unexpected and unusual impulses of children or others, and is not responsible for injuries which may happen to people arising from sudden and not to be apprehended action upon their part.

The deceased, with her little companions, saw the car when it was about a block and a half away, and began running in the direction in which it was going. They did not run in front of the car, and were not in a place of peril, as, by the side of appellant's track, they proceeded along the street.

If the deceased had stopped in her flight she would have been uninjured; if she had followed her companions she would have been, as they were, unharmed. Her tragic death was caused by her suddenly springing from a place of safety, in front of appellant's car, at a time when it was too late to stop the car ere it came in contact with her.

Under these circumstances, the only question which could be presented to the jury was, whether the motorman, seeing these children running along beside the track, had reason to think that they might be frightened by the approach of the car, and in their childish indiscretion, instead of

stopping in the line which they were pursuing, or turning away from appellant's track, might, as one of them did, suddenly dart in front of the car. Had they been adults, it is certain the motorman might have presumed that they would pursue a reasonable and rational course; but being little children, it is perhaps the case that he was bound to consider that they might be so frightened that they would do as the deceased did, the very opposite of what was prudent, and thus rush from a place of security into one of deadly peril.

That one is not obliged to all the while so guard his movements that injury may not be inflicted upon a child who suddenly throws itself in his path, is established by many cases. *Messenger v. Dennie*, 137 Mass. 197; *Bulger v. Albany R. R. Co.*, 42 N. Y. 459; *Hearn v. St. Charles St. R. R. Co.*, 34 Louisiana Annual, 160; *Gallaher v. Crescent City R. R. Co.*, 37 Louisiana Annual, 288; *Goshorn v. Smith*, 92 Pa. St. 435; *Heslonville Passenger R. R. Co. v. Connell*, 88 Pa. St. 520; *Warner v. The People's St. Ry. Co.*, 141 Pa. St. 615; *Am. & Eng. Ency. of Law*, Vol. 4, p. 46, note 4; *Fenton, Adm'r, v. Second Ave. Ry. Co.*, 126 N. Y. 625.

It may add to the faith of those who believe that there is nothing new, to recall that twenty-three centuries ago, Lysias, an Athenian orator, presented to an Athenian court the question of responsibility for the accidental death of one who ran within range of a javelin hurled by the defendant while exercising in a gymnasium.

Adolph Peters v. Emma Balke.

Sophie Muller v. Same.

68	587
167	150
68	587
170	304

1. **FORCIBLE ENTRY AND DETAINER**—*Possession by Grantor of Plaintiff*.—In an action of forcible entry and detainer it is not necessary that a plaintiff, who claims under the sixth article of the second section of the forcible entry and detainer act, should show that his grantor had actual possession of the premises claimed; a possession by tenant will be sufficient.

2. *SAME—Deeds Admissible as Evidence.*—While it is true that questions of title can not be determined in an action of forcible entry and detainer, it does not follow that deeds are inadmissible as evidence in such an action; on the contrary, the statute clearly contemplates their admission.

Forcible Entry and Detainer.—Appeals from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding, in *Peters v. Balke*; the Hon. EDWARD F. DUNNE, Judge, presiding, in *Muller v. Balke*. Affirmed. Opinion filed February 1, 1897.

STATEMENT OF THE CASE.

These are appeals from judgments of the Circuit Court of Cook County, on trials of actions of "forcible entry and detainer," commenced before a justice of the peace and tried in the Circuit Court on appeals by the appellants from judgments in the justice court.

The questions now presented on the records are purely questions of law.

It appears that one Edward Muller on and prior to the 20th of December, 1889, was owner in fee of a lot at 63 Cleveland street, in the city of Chicago. It was improved with a two-story building in front and a cottage in the rear. The judgments in these cases award possession of this cottage to the appellee. Both buildings were, December 20, 1889, occupied by tenants, appellee's husband being the tenant of the top flat of the front house. Edward Muller was then living with appellee and her husband at this flat. After the 20th of December, and before the end of January, he married one Magdalena Hubacher, and in anticipation of the marriage appellee and her husband vacated the top flat. Magdalena died within two years of her marriage to Edward Muller, and Edward, in 1892, married Sophie Muller, appellant here (defendant below), and in May, 1895, he died in the cottage in the rear of the lot, where he and Sophie had lived for some time, leaving her surviving. Deceased made a will—now duly proved in the Probate Court—leaving everything to his widow, the appellant.

Appellee's claim is founded upon two deeds, one a deed of trust from the deceased, dated 20th December, 1889, to

Peters v. Balke.

one Gloeckler, trustee, and one dated May 20, 1895, after the death of Edward Muller, by the trustee to appellee.

The deed of trust purports to convey this lot and its improvement to the trustee upon trusts, *inter alia* :

1. For the grantor for life.
2. After his death, if Magdalena Hubacher, whom he is about to marry, survived him as his widow, said Magdalena to occupy rear house and draw rents from lower flat of front house.
3. During life of Magdalena, Emma Balke, daughter of C. J. H. Muller, to occupy top flat of front house, etc.
4. After the death of said Edward Muller, if he should die unmarried to said Magdalena Hubacher, or after the death of said Magdalena, if she should survive said Edward as his widow, then said trustee Gloeckler shall convey said property by good and sufficient deed to Emma Balke, her heirs and assigns, in fee simple.

The deed from the trustee is in the usual quit-claim form.

The alleged errors relied on in this case are as to the construction and interpretation of the statute, and the deed of trust referred to, appellant insisting (1) that to maintain this form of action under the statute, proof of an actual possession—a *pedis possessio*—by Edward Muller when he executed the deed of trust, was necessary; that a constructive possession by tenant was insufficient; (2) that the action of forcible detainer being a possessory one, the question of the devolution of title under the trust deed could not be litigated in it, and (3) that under a correct construction of the deed of trust appellee acquired no title whatever.

HENRY N. STOLTENBERG and SULLIVAN & McARDLE, attorneys for appellants.

LACKNER & BUTZ, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The sixth article of the second section of the statute of this State relating to forcible entry and detainer, provides

that "when lands or tenements have been conveyed by any grantor in possession, or sold under the judgment or decree of any court of this State, * * * and the grantor in possession or party to such judgment or decree, * * * after the expiration of the time of redemption, when redemption is allowed by law, refuses or neglects to surrender possession thereof, after demand in writing by the person entitled thereto, or his agent, the person entitled to the possession of such lands or tenements may be restored thereto."

In *Jackson v. Warren*, 32 Ill. 331, it was held that the remedy thus provided was not restricted to the nominal party against whom the judgment or decree was rendered, but might be employed against any one who, even after the time of redemption from the sale, obtained possession from the defendant in the judgment or decree; and it was also held that all parties bound by a decree might, within the meaning of this statute, be said to be parties to the decree although not named therein.

The rule thus announced was followed in *Rice v. Brown*, 77 Ill. 549, and in *Kratz v. Buck*, 111 Ill. 40. In the case last named, the court said that if a person against whom a judgment or decree has been rendered, after a sale of his land thereunder before the expiration of the time of redemption, conveyed his interest in the land to another, who entered into possession under such deed, such grantee could not successfully resist an action of forcible detainer brought by the purchaser under the judgment or decree after the time of redemption had expired and he had received thereunder a deed.

The words in the said sixth article, "party to such judgment or decree," being held to include one bound by such judgment or decree, as well as one receiving a conveyance from such party, it seems that the words "grantor in possession" must be held to include parties entering into possession under such grantor subsequent to the making of his grant.

In the present case Edward Muller was the grantor in

possession, and Emma Balke is the grantee under and in pursuance of the grant of Edward Muller; she is, therefore, within the terms of the sixth article of the second section of the statute concerning forcible entry and detainer.

Counsel insists that to the maintenance of this action under said sixth article, an actual *pedis possessio* by the grantor is necessary, and that possession by a tenant is not sufficient.

Said sixth article does not contemplate that the party against whom the judgment or decree has been rendered must have had an actual *pedis possessio* at the time of the rendering of such judgment or decree, in order that after sale and the expiration of the period of redemption an action of forcible detainer may be maintained against him or his grantee, or a person in possession, who is bound by such judgment or decree.

The object of the statute, the purpose and intent for which it exists, is to provide a means by which the person actually entitled to the possession of lands may be speedily restored to the possession thereof.

Under the well known rule that the possession of a tenant is the possession of the landlord, there is no reason why, when such landlord has conveyed premises, he should not be, under the statute of forcible detainer, compelled to give possession thereof to the person entitled thereto, the same as if he had been in actual personal occupancy instead of holding through a tenant.

It is also urged that deeds are not admissible in an action of forcible detainer, it not being for the trial of title, and that neither the deed by Edward Muller nor that to Emma Balke should have been admitted in evidence.

It is true that questions of title can not be determined in an action of forcible detainer, but it does not follow from this that deeds are inadmissible in such action; on the contrary, the statute clearly contemplates the admission of such deeds, as a purchaser under the judicial sale must show valid judgment, execution and deed to recover in such action. *Johnson v. Baker*, 38 Ill. 98; *Kratz v. Buck*, 111 Ill. 40; *Kepley v. Luke*, 106 Ill. 395.

The deed by Edward Muller and that to Emma Balke were properly admitted in evidence. Appellant might have introduced evidence showing that such deeds, or either of them, were or was invalid, but could not have introduced evidence of another title, or contested the validity of the title apparently conveyed by such deeds.

Appellants also insist that the proper construction of the trust deed is such that Emma Balke took under it no title whatever.

The deed has been construed and held to be valid in *Muller v. Balke*, 154 Ill. 110. It is clear that Edward Muller contemplated, in making said deed, the possibility of the state of affairs which existed at the time of his death, namely, that he would survive Magdalena Hubacher, and that Emma Balke would survive him; that at the time of his death he would be, as he then was, unmarried to Magdalena Hubacher, she having died prior to his decease.

The judgments of the Circuit Court are affirmed.

GARY, J. I do not combat the ingenious argument of Judge Waterman, that the remedy by forcible detainer lies in this case, but, as the right to possession depends upon the title, it would seem that a freehold is involved, which deprives this court of jurisdiction.

68 592
172 s 302
68 592
109 s 99

**John J. Ryan and John J. Hayes v. Ernest W. Cooke,
Surviving Partner.**

1. *ESCROW—Simple Contracts May be Delivered in.*—A simple contract in writing as well as a deed may be delivered as an escrow, and the law of escrow is substantially the same in both cases, but such contract can not be delivered directly to the promisee to be held by him as an escrow.

2. *PAROL EVIDENCE—Not Admissible to Show that a Delivery of a Deed was Conditional.*—The rule excluding parol evidence to show that a delivery of a deed to a grantee was upon condition, applies only to deeds which upon their face are complete contracts, requiring nothing but delivery to make them perfect contracts.

Ryan v. Cooke.

8. *SAME—When Admissible to Show that a Delivery was Conditional.*—If a deed is handed to the grantee for the mere purpose of examination, such will not exclude parol evidence to show that the deed was never completely executed or delivered as a completed contract.

Assumpsit.—Breach of contract. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

ENGLISH & HEFFERAN, attorneys for appellants; T. A. MORAN, of counsel.

ALDRICH, REED, FOSTER & ALLEN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This action was based upon an alleged breach in failing to manufacture the burners and measuring apparatus for street lamps by a certain alleged contract agreed to be manufactured. The defense was that the agreement never became binding upon the parties to it; that it was conditionally delivered and not to be binding upon the parties unless the defendants obtained a contract from the city of Chicago.

Upon the examination of defendant John J. Ryan, he was asked a question with reference to the conversation that took place prior to the execution of the contract. The question was objected to. Counsel for appellants stated that what he sought to bring out, was, the conversation in regard to its delivery that was had before the making of the written contract. The objection was sustained. Counsel then made the following offer in behalf of the defendants below, appellants here :

"I now offer to prove by this witness that the contract offered in evidence by the plaintiff was signed by the parties to it on the express understanding and agreement, between said parties, that it was not to become operative unless the defendants obtained a certain other contract from the city of Chicago, and that they never obtained such other contract from the city."

Objections made to the offer were sustained by the court.

In *McCann v. Atherton*, 106 Ill. 31, the Supreme Court of this State, passing upon the question of an alleged conditional delivery of a conveyance of land, said: "The rule of law on this subject is, that a deed, or any other sealed instrument, can not be delivered to the grantee or obligee himself as an escrow, to take effect upon a condition not appearing on the face of such deed or other instrument. The delivery must be made to a stranger, otherwise the deed or other instrument becomes absolute at law."

Counsel for appellee concede that such is the rule with respect to instruments that are necessarily under seal, insisting that the rule is confined to such deeds and does not apply to instruments which have been sealed as a mere matter of choice.

Attention is called to the case of *Blewitt v. Boorum et al.*, 14 N. Y. Supplement 293, in which this distinction was taken, and applied to a sealed contract conveying a right to manufacture, etc., under a patent.

In *Baum v. Parkhurst*, 26 Ill. App. 128, the question being as to the effect of the delivery of a renewal insurance receipt, the court, Baker, J., said: "To allow appellee to show by oral testimony that the delivery of the instrument was not absolute, but conditional only, was to permit him to change the terms of the written contract by parol. The conditional delivery of a deed or instrument in writing which is not to be operative or take effect as an absolute delivery until certain conditions shall be performed, is a delivery in escrow. The delivery of the renewal receipt to appellee was not in escrow, for he was a party to the contract witnessed thereby, and an escrow can be delivered only to a stranger or a third person, and not to a party to such contract. * * * Upon the delivery and acceptance of the receipt, the contract of renewal contained therein and created thereby became an absolute contract, binding upon both parties, and to show the obligation of the contract was to take effect conditionally only was inconsistent itself, and was changing the plain provisions

Ryan v. Cooke.

of a written contract by oral testimony. *Ward v. Lewis*, 4 Pick. 518.

* * * It is urged by appellee that the paper involved in this case was not under seal and was not a deed, and that therefore the law that a deed can not be delivered in escrow to a contracting party, has no application here. The law of escrow is not confined to sealed instruments. A promissory note or other simple contract in writing, as well as a deed, may be delivered as an escrow, and the law of escrow is substantially the same in both cases, and such note or contract can not be delivered directly to the promisee to be held by him as an escrow. 1 *Parsons on Notes and Bills*, 51; *Worrall v. Munn*, 5 N. Y. 229; *Foy v. Blackstone*, 31 Ill. 538; *O. O. & F. R. V. R. R. Co. v. Hall*, 1 Ill. App. 612."

In *Moss v. Riddle & Co.*, 5 Cranch, 351, the court, Marshall, C. J., said: "It is admitted by the counsel in this case, that a bond can not be delivered to the obligee as an escrow. But it is contended that where there are several obligees constituting a copartnership, it may be delivered as an escrow to one of the firm. The court, however, is of opinion that a delivery to one is a delivery to all."

In 5 *Am. & Eng. Ency. of Law*, p. 450, the rule is thus announced: "In order to be an escrow, it must be delivered to a stranger; nothing but an absolute delivery can be made directly to the grantee."

In the same work, Vol. 6, p. 858, it is said: "A deed or other instrument can not be delivered to the grantee or obligee as an escrow, to take effect on a condition not appearing on its face. In order to operate as an escrow, the delivery must be made to a stranger (one not a party), otherwise the deed or other instrument will become absolute at law, and parol evidence of conditions qualifying it is inadmissible."

The rule excluding parol evidence to show that a delivery of a deed to a grantee was upon condition only, applies only to deeds which, upon their face, are complete contracts, requiring nothing but delivery to make them perfect contracts.

If a deed is handed to the grantee named therein for the mere purpose of examination, such delivery will not exclude parol evidence to show that the instrument was never completely executed, and was never handed over as a completed contract. *Dietz v. Parish*, 53 Howard's Pr. Reports, 217; *Cooks v. Barker*, 49 N. Y. 107; *Brackett v. Barney*, 28 N. Y. 341.

As to the relief that may be afforded by a court of equity, in a case of conditional delivery, see *Flagg v. Mann*, 2 Sumner (U. S.), 486.

In the present instance, according to the contention of appellants, the deed delivered was a contract that if appellants made certain arrangements with the city of Chicago, the deed would be a binding obligation; in other words, it was by its delivery made a contract which neither party could have revoked, and which would have been binding upon each had appellants obtained their expected agreement with the city of Chicago.

The contention of appellants is, really, that they should be allowed to introduce evidence to show in contradiction of its terms to what extent the deed was a contract, not that by a conditional delivery to a party it was no contract at all.

The evidence offered was properly excluded, and the judgment of the Superior Court is affirmed.

SHEPARD, P. J., and GARY, J.

We concur in the result, but not in what is quoted as to delivery upon condition of unsealed instruments.

Amanda C. Caldwell et al. v. Antonie Ellebrecht.

1. FORECLOSURE—*Of Trust Deed on Default of the Payment of Interest and Taxes.*—The foreclosure of a trust deed for a default in the payment of interest and taxes before the maturity of the principal sum secured, is sustained in this case.

Foreclosure, of trust deed. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in

Caldwell v. Ellebrecht.

this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

ELMER W. ADKINSON, attorney for appellants.

PARKE E. SIMMONS, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In this case a bill to foreclose a trust deed in the nature of a mortgage was filed by the appellee against the appellants, who were the makers of the trust deed and of the notes secured thereby. The principal note for five thousand dollars had not by its terms matured when the bill was filed, but there had been a default in the payment of a small amount of interest due upon one of the interest coupons for more than thirty days, and there had been also a default in the payment of taxes for the year 1894, and appellee had paid them, and before the bill was filed a further default had occurred in the payment of an interest coupon which matured two days previous thereto. The trust deed provided that in case of a default for thirty days in the payment of interest, or of taxes, the whole of both principal and interest should, at the election of appellee as holder of the notes, become at once due and payable, and it was in pursuance of such conferred power that appellee elected, because of the defaults that had been made for more than thirty days, to declare the whole sums due and payable.

All of such matters were found and reported by the master to whom the cause was referred, and his report was confirmed in all respects, except that his allowance of \$250 for solicitor's fees was cut down to \$150, and a decree accordingly was entered.

We can not take time to consider at length the inequity urged by the appellants in permitting appellee to declare the whole sum to be due and payable, for the default in the payment of a small part of an interest note, upon which payments in installments had been made and accepted.

Such inequity would have been more striking if the appellants had paid the taxes upon the premises when they became due, and had not defaulted, although but for two days, in the payment of another interest note which fell due before the bill was filed.

The covenant of appellants was not only to pay the interest notes in full at maturity, but was also to pay the taxes when they became due and payable, and if they were not paid by appellants before the commencement of the annual tax sale, the appellee was empowered, at his option, to pay the same, and the amount so paid should thereupon become so much additional indebtedness secured by the trust deed.

We may take notice that under the laws of this State, taxes upon realty are due and payable on (or before) May first in each year, and it was shown that the taxes in question were paid by appellee on the day the bill was filed, on August 10, 1895, and that the tax sale was then in progress.

It was also made to appear that after the bill had been filed, the appellants might have adjusted the matter with appellee's agent by paying the interest, taxes and costs, with one hundred dollars solicitor's fees. But appellants refusing to pay the solicitor's fee that was demanded, the adjustment was not made. The trust deed provided for the payment of a solicitor's fee, and under the law a reasonable one is allowable, when so provided. We are not at liberty to substitute our own judgment for that of the master and the chancellor, and say that the demand for one hundred dollars as a solicitor's fee at that stage of the suit was so unreasonable as to justify a reversal of the decree.

Upon the record as made the decree must stand, and it is affirmed.

Calumet El. St. Ry. Co. v. William C. Lewis, Adm.

1. *PRACTICE—Waiver of Objections to the Declaration.*—An objection to a declaration which may be removed by an amendment, and which is not alluded to in a motion for a new trial, is waived.

2. *ELECTRIC CARS—Diligence Required of Motormen.*—In an action

Calumet El. St. Ry. Co. v. Lewis.

against a street car company for killing a child, a passenger testified that she saw the child start across the street before the car started, but the motorman did not see the child until it was too late to stop the car. The court below, in trying the case without a jury, was justified in finding that the motorman ought to have seen the child sooner.

Trespass on the Case.—Death from negligence. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

JUDSON F. GOING and J. A. BURHANS, attorneys for appellant.

WM. C. ASAY and ROBERT REDFIELD, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee, administrator of the estate of Edna M. Lewis, deceased, was, at the time of the death of the latter, a barber at 9262 South Chicago avenue, with his shop on the ground floor and housekeeping rooms above, where, with his wife and two children, he resided.

The eldest child was Edna, and she was but two years and five months old—a mere baby. She was run over and killed by an electric car of the appellant when the car had gone less than its own length from the place of starting. She was running across the street to her father's house.

Five minutes before she had been in the house, and how she happened to be on the other side of the street is unexplained.

A passenger in the car testified that she saw the child start across the street before the car started. The motorman did not see the child until she was in front of—almost under—the car; too late to stop the car. From the time that he did see her, he was guilty of no negligence, but the court, trying the cause without a jury, was justified in finding that he ought to have seen her sooner. Chicago West Division Ry. v. Ryan, 31 Ill. App. 621; 131 Ill. 474.

What is said in that case in both reports is an answer to all that is urged here by the appellant as to the absence of

negligence by the appellant, and of care by the parents of the child.

The appellee finds it difficult to deal with the objection of the appellant, based upon Chicago and Alton R. R. v. Logue, 47 Ill. App. 292, 53 Ill. App. 142, and 158 Ill. 621, that the younger child was not mentioned in the declaration; and "we therefore confidently submit this case to your honor's judgment," says his counsel. Whether the judgment of the Appellate Court of the Fourth District is consistent with what the Supreme Court held in Conant v. Griffin, 48 Ill. 410, we need not consider, as in this case the appellant filed "points in writing" upon a motion for a new trial, and neither among those points, nor at any stage of the suit, was the omission to mention that child in the declaration alluded to. The objection—whatever may be in it—is waived. *Brewer v. Nat. Un. Bldg. Ass'n*, 64 Ill. App. 161; *Grand Lodge v. Bagley*, 60 Ill. App. 589; *Hafner v. Herron*, *Ibid.* 592.

It could easily have been removed by amendment, even after verdict. Such amendment would not have been a statement of a new cause of action. *Haynie v. Chicago & Alton R. R.*, 9 Ill. App. 105.

And it would not have been too late to make it whenever appellant made the point. *Independent Order v. Paine*, 122 Ill. 625. The judgment is affirmed.

68 600
168 514

Henry A. Foster, Adm., v. Wadsworth-Howland Co.

1. INSTRUCTIONS—*To Find for the Defendant—When Proper.*—Where a judgment is reversed and remanded upon the ground that there can be no recovery upon the evidence, and is again tried upon evidence in no wise essentially differing from that heard upon the former trial, it is proper for the court to instruct the jury to find for the defendant.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

Kennedy v. I. C. R. R. Co.

B. M. SHAFFNER, attorney for appellant.

KERR & BARR, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This cause was before us upon appeal once before, and our opinion reversing the then judgment against the present appellee, is reported in 50 Ill. App. 513. The case having been again tried upon evidence in no wise essentially differing from that heard upon the former trial, the trial court, in conformity with our holding that there could be no recovery upon the evidence and under the law, instructed the jury to find the defendant, appellee, not guilty, and a verdict and judgment went accordingly.

Our former opinion and judgment constitute the law of the case for this court, and the judgment is affirmed.

John Kennedy, Adm., v. Illinois Central Railroad Co.

68	601
70	139
68	601
71	73
68	601
95	94

1. BILL OF EXCEPTIONS—*What Must Appear in.*—Without an exception preserved in the bill of exceptions, no ruling, however improper, that does not relate to the pleadings or appear on the face of the judgment, can be reversed in an appellate tribunal.

Trespass on the Case.—Death from negligent acts. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

WILLIAM E. O'NEILL and DARROW, THOMAS & THOMPSON, attorneys for appellant.

JOHN G. DRENNAN, attorney for appellee; JAMES FENTRESS, of counsel.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This action was brought to recover damages for the death

of appellant's intestate occasioned by the alleged negligence of the appellee.

At the conclusion of the plaintiff's evidence the court, upon the motion of the defendant, instructed the jury that the plaintiff was not entitled to recover, and a verdict followed accordingly.

A motion for a new trial ensued and was overruled. Neither to the giving of the instruction, nor to the overruling of the motion for a new trial, was any exception taken, and the point is insisted upon by the appellee as fatal to the right of appellant to have a reversal, and it is fatal. It does appear by the transcript, made by the clerk, of the judgment record, that the plaintiff "entered his exceptions herein," but that was insufficient and did no good. Exceptions can only become matters of record when certified by the trial judge.

The rule is inflexible that, without an exception preserved in the bill of exceptions, no ruling, however improper, that does not relate to the pleadings or appear on the face of the judgment can be reviewed in an appellate tribunal. *Martin v. Foulke*, 114 Ill. 206; *James v. Dexter*, 113 Ill. 654; *City of Jacksonville v. Cherry*, 39 Ill. App. 617; *Fries v. Fries*, 34 Ill. App. 142; *City of Rock Island v. Riley*, 26 Ill. App. 171.

We might cite many other cases.

The only assigned error that is argued is that which challenges the correctness of the action in giving the instruction we have referred to.

It was attempted by a supplemental bill of exceptions to show that the peremptory instruction in favor of appellee was excepted to, but it was not accomplished.

Whether the trial judge properly refused to allow the alleged exceptions to be shown is not before us. Probably the question could only have been presented to us by a mandamus proceeding, which was not attempted.

The judgment is affirmed.

C. D. F. Smith v. Albert M. Billings.

68 603
169 294

1. TRIAL BY THE COURT—*Finding Conclusive*.—Where the trial is by the court without a jury the finding is, as a general rule, conclusive.

Assumpsit, for attorney's services. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

WILLIAM P. BLACK, attorney for appellant.

WINSTON & MEAGHER, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought March 8, 1894, by appellant to recover compensation for services as an attorney rendered from January 1, 1885, to October 7, 1893.

Nothing has ever been paid for the alleged services, and appellee denies not only the employment, but the service.

The cause was tried by the court, a jury having been waived.

The plaintiff also sought to recover from the defendant a balance claimed to be due plaintiff for fifty-two shares of the capital stock of the Home National Bank of Chicago, alleged to have been sold by the plaintiff to the defendant June 11, 1891.

The court found the issues and rendered judgment for the defendant.

No complaint is made as to any holding of the court below upon any proposition of law; the entire argument, here made, is as to the alleged erroneous conclusion of the Circuit Court upon questions of fact.

We have examined the voluminous abstract and briefs here presented, and are unable to say that the preponderance of the evidence is such that we ought to reverse the conclusion arrived at by the court below.

We regard the letter written by appellant February 13, 1893, after the termination of all the service and all the transactions for which a recovery is here sought, as inconsistent with the plaintiff's claim. True, appellant was, when he wrote this, upon a sick bed, but it does not appear that his mental faculties were impaired, or his understanding clouded.

The letter is rational, intelligent, consistent; it is simply not in agreement with the claim now made.

The evidence in the case is contradictory. Had we heard the cause in the court below we might have come to a different conclusion. The question presented to us, is not what we regard the preponderance of the evidence shows, but is the clear preponderance of the evidence so opposed to the finding that it must be set aside? This we are unable to hold. It is no uncommon thing for men to regard transactions very differently, and consequently be at variance as to obligations, if any, arising therefrom. Such condition exists in the present case.

The judgment of the Circuit Court is affirmed.

68 604
170 408

Union Stock Yards & Transit Company v. Joseph Karlik.

1. *HIGHWAY—Burden of Proof in Actions for Personal Injuries.*—Evidence that a strip of land, although filled with railway tracks and not traveled by teams was, however, traveled daily by a great many persons on foot in going to and from the various industries in which they were employed, who without contradiction spoke of it as a street, is sufficient to warrant the submission to a jury of the question of fact whether the location of an accident was or was not in a public highway.

2. *NEGLIGENCE—Brakemen on Freight Trains.*—The failure of a railroad company to keep a brakeman upon the hindmost car of a freight train, while in motion, as required by section 90, chapter 114, R. S., is negligence.

3. *VERDICTS—On Questions of Fact, Conclusive.*—In an action for personal injuries the questions as to whether the plaintiff was, at the time of the injury, a trespasser upon the defendants' premises, or was guilty of contributory negligence, are questions of fact for the jury, and its verdict upon competent evidence is conclusive as to such questions.

Union Stock Yards & Transit Co. v. Karlik.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; The Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

FRANK O. LOWDEN, attorney for appellant.

JONES & LUSK, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee recovered a verdict and judgment for \$2,000 for personal injuries received by him by being run upon by one of appellant's trains that was "backing up" on its tracks on what is alleged to be Loomis street, between 42d and 43d streets, in what may be called the Stock Yards District.

The appellant offered no evidence, and the case went to the jury just as it was made by the appellee.

The amount of damages is not questioned, if any recovery may be had, but the appellant contends that appellee was a trespasser, and, there being no evidence of wantonness or willfulness, or of gross negligence amounting to such, in law, on the part of appellant, that no recovery should have been had; and also that appellee himself was guilty of such contributory negligence as barred his right to recover.

The appellee was, on the day of the accident, working for Swift and Company, the packers, and quitting his day's job at two o'clock in the afternoon, started from the office where he deposited his time check to go home, and in so doing walked across and along railway tracks which, as claimed by appellee and denied by appellant, lay in Loomis street between 42d and 43d streets. Unaided by a diagram it is hardly possible for one not acquainted with the immediate locality to describe the physical situation with any approach to accuracy, and we will not attempt it.

He seems to have entered upon the tracks at 42d street, and gone south on a track upon which, before he had gone far, a locomotive approached from the south and required

him to step aside. He then turned partly to the left and proceeded diagonally in a southeasterly direction past the back end of a standing freight train and entered upon the track on which such train stood, and proceeded along. Before he had gone many steps on that track, the train backed up and ran over him.

The chief point in the case was whether the tracks in question were in a highway, or in other words, whether appellee was a trespasser. They were located in what was generally spoken of in the vicinity as Loomis street.

There is no evidence in the record that the grounds upon which the tracks were laid were private property.

It was proved that Loomis street, as a public highway, existed for long distances both to the north and south of, and on a line with, the strip of land upon which the tracks in question were laid. But it appears that this strip of land running north from about 45th street to 40th street, is filled with railway tracks, and is not traveled by teams.

It is, however, traveled daily by a great many persons on foot in going to and from the various stock yards industries—the evidence showing without contradiction, that from 1,500 to 2,000 people walk there, to and fro, every day. And all of the witnesses who testified spoke of it as Loomis street.

We think there was sufficient evidence to warrant a submission to the jury of the question of fact whether the location of the accident was or not in a public highway. Certainly the appellant was bound to take notice of the use the people in the neighborhood had made daily, for years, of what was known to them as a highway, and it seems to be quite clear that the burden was shifted upon the appellant to show in some way, if it could, that the tracks were laid upon its own property, although it is not clear that if it had so shown it would have been an effectual defense. *P., Ft. W. & C. Ry. Co. v. Callaghan*, 157 Ill. 406.

The plaintiff in one count of his declaration set forth the negligence of appellant as consisting in the operation of said train without a brakeman upon the hindmost car, as

Webster Manufacturing Co. v. Mulvany.

required by Sec. 90, Chap. 114, R. S., and the evidence showed that there was no brakeman there.

It is manifest that if there had been a brakeman so stationed, timely warning of the backing up of the train might have been given to appellee, and his injury avoided.

Was the appellee a trespasser, was there negligence by the appellant, and was appellee guilty of contributory negligence, are, severally, questions of fact which the jury has answered in favor of the appellee upon what we regard as competent evidence, and no other questions having been argued, we must affirm the judgment.

MR. JUSTICE GARY.

With the doctrine of comparative negligence discarded, the right to recover under circumstances as shown in this record, is very doubtful.

Webster Manufacturing Co. v. Patrick Mulvany, Adm.

1. DUE CARE—*Who is Entitled to the Exercise of, for his Protection.*—A laborer for a plumbing company, which had a contract with the defendant to put in water pipes, who was at work digging a trench in close proximity to a steam pipe, is in legal contemplation there by invitation of the defendant, and entitled to the exercise of due care by such defendant for his protection.

2. VERDICTS—*Upon Conflicting Evidence, Conclusive.*—The verdict of a jury upon conflicting evidence as to whether an explosion of a steam pipe was due to an inherent latent defect not discoverable by inspection, or to letting steam into the engine while water stood in the pipe, can not be disturbed.

3. WITNESSES—*Competency of a Steam Fitter to Testify as to Cause of Explosion.*—A steam fitter, with some, but not very great experience in running engines, who was present at the time of the explosion of a steam pipe and observed something of the conduct of the engineer, and who saw the pipe and its connections after the explosion, is competent to testify to his opinion as to the cause of the explosion.

Trespass on the Case.—Death from negligent acts. Appeal from the Superior Court of Cook County; the Hon. JAMES HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

68	607
188	311
68	607
107	116

RICH & STONE, attorneys for appellant.

O'DONNELL & COGHLAN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action for the recovery of the pecuniary loss of the next of kin by the death of John Mulvany, of whose estate the appellee is administrator.

The appellant had just put into its works a new 225 horse power engine.

On the morning of October 28, 1892, the engine was started in motion, and almost immediately the ten inch steam pipe connecting the engine with the boilers burst, scalding John Mulvany so that in consequence thereof he died. At the time of the explosion the deceased was digging a trench very close to the steam pipe, as a laborer for a plumbing company which had a contract with the appellant to put in water pipes. In legal contemplation he was there by invitation of the appellant (*Barnum v. Wagner*, 64 Ill. App. 375), and entitled to the exercise of due care by the appellant for his protection. *Fisher v. Jansen*, 30 Ill. App. 91.

The cause of the explosion is therefore the material—or most material—question in the case. The evidence, which fills nearly 370 pages of the record, made it a fair question for the jury whether the explosion was due to an inherent latent defect in the pipe, not discoverable by inspection, or to letting steam into the engine while water stood in the pipe. There is abundant evidence that either of these causes would have been adequate, and upon the conflicting evidence the verdict of the jury, that the latter was the true cause, can not be disturbed.

The steam was let in by the engineer of the appellant in the regular course of his employment, and, as the verdict in effect finds, without proper precaution in draining the water from the pipe, for which means were provided.

There is some criticism upon permitting steam fitters who had also had experience—not very great—in running

West Chicago St. R. R. Co. v. Yund.

engines, who were present at the time of the explosion, and observed something of the conduct of the engineer, and also saw the pipe and its connections after the explosion, to testify to their opinion as to the cause. In this was no error. Camp Point Co. v. Ballou, 71 Ill. 417.

No complaint is made of the instructions. The damages awarded—\$2,500—do not indicate passion or prejudice by the jury. The deceased was nearly twenty-one years old, unmarried, and gave his wages—\$18 per week—to his father.

The judgment is affirmed.

West Chicago St. R. R. Co. and North Chicago St. R. R. Co. v. John Yund, Jr.

1. **NEGLIGENCE—Joint Liability.**—Where an injury is the result of the joint negligence of two persons, an action will lie against them jointly for the damages sustained.

2. **STREET RAILWAYS—Care in Operating Parallel Lines.**—Great care is required of street railway companies in the operation of parallel lines within a few feet of each other.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

STATEMENT OF THE CASE.

This was an action by appellee, John Yund, Jr., by his next friend, John Yund, Sr., against the appellants, West Chicago Street Railroad Company and North Chicago Street Railroad Company, to recover damages for personal injuries received by him while a passenger of the North Chicago Street Railroad Company by striking against a horse attached to a car of the West Chicago Street Railroad Company.

At the time of the accident, February 24, 1891, the appellant, the North Chicago Street Railroad Company, was

operating a line of cable cars which, in the South Division of the city, ran along Randolph street, between Dearborn and La Salle streets, westward, and the appellant, the West Chicago Company, was then operating a line of horse cars on Randolph street between the said points, on tracks parallel with that of the North Chicago Company.

On February 24, 1891, appellee, who was then about fifteen years of age, approached the grip-car of the North Chicago Company, from the south side, somewhere between Dearborn and Clark streets, on Randolph street, and stood upon the foot-board on the south side of the car, and just after boarding the car and while he was standing upon the foot-board, he was struck by a horse of the West Chicago Company.

The jury rendered a verdict for the plaintiff against both of the defendants; damages being assessed at \$16,500; from this \$11,500 was remitted, and judgment was entered for \$5,000.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellants.

JOHN F. WATERS, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Contrary to the earnest contention of appellants, we think that there was evidence that the injury to appellee was caused by the joint negligence of the defendants below. West Chicago Street Ry. Co. and North Chicago Street Ry. Co. v. Annis, 62 Ill. App. 180; West Chicago Street Ry. Co. and North Chicago Street Ry. Co. v. Cahill, 64 Ill. App. 539.

The construction of appellants' respective roads is such that great care is necessary in the operation of parallel lines within a few feet of each other.

The judgment of the Superior Court is affirmed.

Ernest H. Janes v. James H. Gilbert.

1. **SPECIAL FINDINGS—Upon Conflicting Evidence.**—Where a jury, upon conflicting and irreconcilable testimony, answer a special interrogatory, properly submitted, and it is not controverted in the court below, such finding is binding upon the Appellate Court.

2. **INSTRUCTIONS—Improper Refusal Not Always Error.**—The refusal of an instruction, correct in itself, where the real issue was so clearly presented to the jury that it can not be believed that they did not fully understand it, and where such refusal did the party asking it no harm, is not reversible error.

3. **REPLEVIN—Judgments Under Section 22, Chapter 119, R. S.**—The provisions of Section 22, Chapter 119, R. S., entitled "Replevin," providing that if property in question is held for the payment of any money, the judgment may be in the alternative—that the plaintiff pay the amount for which the same was rightfully held, with proper damages, within a given time, or make return of the property—should be understood as meaning what the statute says, and not as applying only where the money was due and owing from the plaintiff, and that in any case the amount to be paid should not exceed the value of the interest in the property which could be subjected to the payment for which it was held.

4. **JUDGMENTS—In Replevin—Form of, Under Sec. 22, Chap. 119, R. S.**—The form of an alternative judgment, under Sec. 22, Chap. 119, R. S., entitled "Replevin," held sufficient.

Replevin.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

RICH & STONE and RANDALL W. BURNS, attorneys for appellant; FLOWER, SMITH & MUSGRAVE, of counsel.

HENRY M. BATES, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee, as sheriff of Cook county, levied an execution, in which one George L. Janes was a defendant, upon a stock of merchandise which the appellant claimed to solely own, and replevied. The real issue was whether the said George J. L. Janes was a partner in the business, where he was engaged in some capacity, and which business was conducted under the name and style of Janes Bros. & Co.

Upon conflicting and irreconcilable testimony the jury answered a special question : " Q. Do you find, from the evidence, that at the time of the seizure of the property described in the declaration in this case, George J. L. Janes had some interest as a partner in the property seized? A. Yes." It is not controverted that if that question was rightly answered, the seizure was lawful, and the replevin was wrong.

The verdict binds us.

Though some instructions, correct in themselves, which the appellant asked were refused, yet the real issue was so clearly presented to the jury that it can not be believed that they did not fully understand it, and such refusal did the appellant no harm.

The abstract does not show what replication was put in to the plea of the appellee justifying under the execution, but the course of the argument assumes that the issue under it was such as only to raise the question whether George J. L. Janes was, as partner, an owner in part of the goods seized. The amount for which such levy was rightly made, if he was such partner, was not in dispute. Upon the verdict in favor of the appellee the judgment is as follows :

" Thereupon it is considered by the court, and is so ordered, that the plaintiff do make return within ten days herefrom, of the property seized under authority of the replevin writ heretofore issued in this cause, and in the default of such return that the defendant do have and recover of and from the plaintiff the sum of fourteen hundred and twenty-seven and ninety-four one-hundredths dollars, said sum being the amount of the judgment, with taxed cost, for which said property was rightfully held under and by virtue of a writ of execution at the time it was seized as aforesaid, together with interest thereon, at the rate of six per cent per annum from the 15th day of November, 1892, to the 2d day of March, 1896; and in default of the return by the plaintiff of the property in accordance with this order, it is further ordered that the defendant have execution for said sum of fourteen hundred and twenty-seven and ninety-four hundredths dollars."

Chicago City Ry. Co. v. Taylor.

The appellant contends that such a judgment is erroneous; that the words of Sec. 22, Ch. 119, Replevin, "if the property was held for the payment of any money, the judgment may be in the alternative, that the plaintiff pay the amount for which the same was rightfully held, with proper damages within a given time, or make return of the property," should be understood as applying only where the money was due and owing from the plaintiff, and that in any case the amount to be paid should not exceed the value of the interest in the property which could be subjected to the payment for which it was held.

The alternative judgment gives to the plaintiff the option which he will do, pay or return, and is therefore not harsh upon him. If he has put it out of his power to return, the verdict and judgment against him establish that he did do so in his own wrong. We are to read the statute as meaning what it says. The comment upon the language of the quoted section, contained in *Lamping v. Payne*, 83 Ill. 462, was made in reviewing a judgment upon demurrer to a plea, from which plea the court had first, by construction, cut out all of the allegations under which any inquiry as to the construction of the statute would have been pertinent; and therefore what the Supreme Court said in *Brown v. Coon*, 36 Ill. 243, and *Mayer v. Erhardt*, 88 Ill. 452, as to the force of *dicta*, is applicable to that comment.

Can any reason be suggested why a mere wrongdoer, without colorable claim of right, replevying property upon which the defendant has but a lien, should be in a better position when defeated than would be the general owner, in good faith disputing the lien?

There is no error, and the judgment is affirmed.

68 613
170* 49

Chicago City Railway Company v. William Taylor.

1. NEGLIGENCE—*Questions for the Jury*.—Questions of negligence, or the lack of it, are within the especial province of the jury, and when properly submitted must be regarded as settled by the verdict.

2. SPECIAL INTERROGATORIES—*Proper Object of*.—The proper object

of a special interrogatory is not to obtain answers to particular evidentiary facts, but should be confined to facts which, in their nature, are conclusive upon some question at issue.

3. DAMAGES—*What can not be Considered in Reduction of.*—The mere fact that a person permanently injured physically possesses mental qualifications and acquirements which enable him temporarily, at least, to earn higher pay in a clerkship, where he may sit while working, is no sufficient ground for cutting down the amount of his recovery.

4. DAMAGES—*\$15,000 Not Excessive.*—Where a person is physically disabled from all active bodily exertion for the rest of his life—can only walk the streets with crutches, and at the end of four years is suffering great pain—a verdict for \$15,000 is not excessive.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

W. J. HYNES and H. H. MARTIN, attorneys for appellant.

FREDERICK ST. JOHN and BENJAMIN F. RICHOLSON, attorneys for appellee; A. W. BROWNE, of counsel.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of \$15,000, recovered by the appellee, for injuries to his person.

The appellee was the driver of a horse car operated by the West Chicago Street Railroad Company on its Adams street line, which crosses at nearly a right angle the line of cable road operated by the appellant on State street, and the accident happened at the intersection of State and Adams streets.

While the horse car was moving westward across State street, the grip car of a north-bound cable train struck it toward its rear end, threw it from the track, and knocked the driver off so that he fell in front of his car, and, the horses becoming unmanageable, he was dragged along in front of and under the car for several feet, occasioning to him the injuries complained of.

The negligence charged against the appellant, in the several counts of the declaration, was the failure to give warning or signal of the approach of the cable train, its operation at an excessive and dangerous speed, and the failure to stop or slacken such speed, etc.

The want of ordinary care by the appellee for his own safety, and his own guilty negligence, and the lack of negligence by the appellant, are questions that are argued from the evidence with the ability and learning for which counsel for the appellant are deservedly distinguished, and if such questions were ones that we had the right under the law to take into our own hands, freed from the conclusions that the jury have drawn from evidence that leaves the several questions uncertain in fact, we would discuss them. But it is so improbable that a like combination of stupidity and, possibly, criminal carelessness, by the drivers of two cars situated with reference to each other as these cars were, will arise again, that we will not take the time to set forth the evidence for the mere purpose of showing how peculiarly the questions of negligence, or a lack of it, that were submitted to the jury came within their special province, and must be regarded as settled by their verdict.

At the instance of the appellant the court submitted to the jury two special interrogatories as follows:

“First. Was there a custom at Adams and State streets, prevailing at the date of the accident, which gave the cable trains the right of way over the horse cars?”

Eighth. Could the plaintiff, Taylor, by the exercise of reasonable and ordinary care and watchfulness on his part have avoided the collision in question?”

To each question the jury had answered “No,” and such answers were entirely consistent with the general verdict.

We think the complaint, because the trial court refused to submit to the jury certain other special interrogatories that were asked by appellant, is not well founded. They were all involved and embodied in the eighth one that was given, which was more general in its terms than either of

those that were refused, and presented a question which, if answered affirmatively, would have been conclusive against the appellee.

The proper object of a special interrogatory is not to obtain answers to particular evidentiary facts, but should be confined to facts which in their nature are conclusive upon some question at issue. *Taylor v. Felsing*, 164 Ill. 331.

As to the instructions, the only one concerning which the action of the court is argued to be erroneous, is the one to find the defendant not guilty. We have already said all that is required to answer such alleged error.

The excessiveness of the verdict is pressed upon our attention with special emphasis, and although we are impressed that it ought not to have been so large, we discover no legitimate ground upon which to base the requirement of a remittitur as a condition of affirmance for any less sum.

The trial seems to have been a fair one in every sense that a record can disclose, and the mere fact that a person so shockingly and permanently hurt physically, possesses mental qualifications and acquirements which enable him, temporarily, at least, to earn higher pay in a clerkship, where he may sit while working, than he received while a car driver, is no sufficient ground for cutting down his recovery.

The facts remain that it is quite probable that he is physically disabled from all active bodily exertion for the rest of his life; that he can walk the streets only by the aid of two crutches; that it is but conjecture that time may ameliorate his condition; that at the end of four years he is suffering great pain. In view of what this court has said in *C. & E. I. R. R. v. Holland*, 18 Ill. App. 418; *Chicago City Ry. v. Wilcox*, 33 Ill. App. 450; *City of Chicago v. Leseth*, 43 Ill. App. 480, this court will follow the example of the Supreme Court in *Ill. Cent. v. Simmons*, 38 Ill. 242, and "not take the responsibility of determining" that the damages are exorbitant.

Boyce v. Commercial Publishing Co.

We discover in the record no such error as demands that the judgment be reversed, and it will therefore be affirmed.

MR. JUSTICE WATERMAN dissents.

William D. Boyce v. Commercial Publishing Co.

68 617
109s 256

1. ACQUIESCENCE—*Justifies a Conclusion.*—The long acquiescence in this case justifies the finding of the court below in favor of the plaintiff.

Assumpsit, on a promissory note. Payee v. Indorser. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

QUIGG & BENTLEY, attorneys for appellant.

MORAN, KRAUS & MAYER, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
The appellee sued the appellant upon the guaranty shown as follows:

“\$2,500.

June 30, 1892.

One year after date I promise to pay to the order of Commercial Publishing Co. twenty-five hundred dollars, at office Press News Ass'n, Chicago. Value received.

(Signed) H. P. HALL.

(Indorsed) W. D. BOYCE.”

There is considerable dispute, both on law and fact, as to the acceptance by the appellee and withdrawal by the appellant of the guaranty, but the facts about which there is no dispute are, that June 30th the appellant wrote and sent the following letter:

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Boyce v. Commercial Publishing Co.

"PRESS NEWS ASSOCIATION.

Officers :

T. J. Keenan, Jr., Prest.,
Pittsburgh Press.W. H. Griffith, V. Prest.,
Denver, Col., Sun.W. D. Boyce, Treas.,
Chicago.H. P. Hall, General Manager. 118 Fifth Avenue, Chicago.
CHICAGO, June 30, 1892.

News Office :

World Building, Room 191,
New York.

Executive Office :

237 Broadway, Room 44,
New York.

Business Office :

Mercantile Bank, Memphis, Tenn.

GENTLEMEN: Will you please have the Commercial Publishing Co. indorse the inclosed certificate of stock in blank, and when so indorsed, deliver to them the note attached, signed by H. P. Hall and indorsed by W. D. Boyce, and return the stock to me.

Yours very truly,

W. D. BOYCE."

July 21, 1892, the cashier of the Mercantile Bank wrote and sent the following letter :

" JULY 21, 1892.

W. D. Boyce, Esq., care of Press News Ass'n, Chicago, Ill.

DEAR SIR: Referring to your favor of the 30th ult., I herein inclose, properly indorsed, certificate No. 164, for 25 shares of stock in Press News Association, and have delivered to the Commercial Pub. Co. note of H. P. Hall, indorsed by you, for \$2,500, dated June 30, 1892, and due July 3, 1893.

Very truly,

C. H. RAINE, Cashier."

From this last date to the time of the trial, the appellant had retained the certificate of stock, and the appellee had retained the note—the time being about three and a half years.

Whatever may have been the backing and filling in July, 1892, this long acquiescence justifies the finding of the court, trying the cause without a jury, in favor of the appellee, and the judgment is affirmed.

Charlotte C. Campbell v. Walter H. Wilson.

1. **CONTRACTS—*Benefits After Repudiation.***—A party to a contract can not both repudiate and claim the benefit of such contract.

Bill for an Accounting, etc.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

THOMPSON, DELAMATER & CLARK, attorneys for appellant.

WILSON, MOORE & McILVAINE, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant filed her bill in equity praying for an accounting with the appellee, and to be permitted to redeem from him certain premises to which he, as a judgment creditor of her deceased son, had acquired title by redeeming the same from a foreclosure sale.

The bill set up that the appellant was the owner of an unassigned dower estate in the premises; that her said son died seized in fee of the premises subject to her said dower; that she had been allowed in the Probate Court and owned a claim for \$1,233.33 against the estate of her said son, which had been appealed to and was pending in the Circuit Court of Cook County; that while said appeal was pending a decree of sale was entered against the said premises, under a trust deed executed by her son in his lifetime, and that on October 22, 1894, said decree was executed by a sale of the premises for \$17,618.41, and a master's certificate of sale duly issued to the purchaser; that she resided upon the premises and was in possession thereof, and that the value thereof was \$35,000.

We believe there is no contention as to the facts so alleged except as to the value of the premises.

Such being the situation, the appellee called upon appel-

lant at her residence some time between the middle of October and the first of November, 1895, and had some negotiations with her as to obtaining title to the premises. He was not then a judgment creditor of her son's estate, although she was, subject to the result of the appeal that had been taken to the Circuit Court from her claim allowed in the Probate Court. Appellee was desirous of obtaining the title to the premises, and was ready to redeem from the foreclosure sale if he should get himself into a position that would give him the right to do so.

Whatever the details or other terms of the agreement that was arrived at between the appellee and the appellant, or her attorney, may have been, it is substantially admitted that appellee offered to pay appellant \$3,500 for her deed of the premises and an assignment of her claim or judgment against her son's estate, and that such offer was to be kept open until a dismissal of the appeal from such judgment could be obtained. No written memorandum of the agreement was made, but in expectation that it would be carried out, appellant's attorney pushed the appeal to a hearing and obtained its dismissal on November 27, 1895.

In the meantime, however, appellant became angry at some conduct authorized by the appellee in removing some sale signs which appellant had put upon the premises, and about the middle of November, 1895, repudiated whatever the contract was, and declared she would not carry it out.

It appears from his answer, that appellee was advised by his counsel, before such repudiation took place, that good title to the premises could not be obtained through the arrangement that appellee had with appellant, and advised the purchase of a judgment against the estate of appellant's son, and the exercise of the right of redemption thereunder; and presumably, to accomplish such result, without waiting for the appeal from appellant's allowed claim to be disposed of, appellee purchased a small judgment on or about November 8, 1895, and on November 9th made redemption thereunder from the foreclosure sale.

At the time such redemption was made by the appellee,

somewhat more than two months remained in which successive redemptions by other judgment creditors might have been made, but the theory of the bill is that appellant was kept and remained in ignorance of the redemption that was made by the appellee, and was lulled into believing, until it was too late for her to redeem, that appellee would carry out his offer to her.

We think it plainly appears that at the time appellee purchased the small judgment and made the redemption thereunder, it was his intention to carry out his offer to the appellant, and that if she had not later repudiated all intention on her part to have anything further to do with his offer, he would have done so. When, however, about the middle of November, she declared she would have nothing more to do with him, appellee had a right to take her at her word, but he was not, because thereof, precluded from going on and obtaining title independently of her and for her own benefit, excluding her, in what he had set out to accomplish.

Whether appellant's attorney, Mr. Curtis, thought, and proceeded on the assumption, that he could induce the appellant to reconsider her determination to have nothing further to do with appellee's offer, is immaterial.

We need not go into the circumstances of why it was advisable or necessary for appellee to purchase and make redemption under the small judgment bought by him. If it were an unnecessarily cautious proceeding upon his part, it was not, therefore, a fraudulent act by him. His offer to her was not impaired by his so doing. It deprived her of no right, and it is not pretended that his doing so was the occasion of her repudiation of the offer, or agreement, made by appellee.

The bill itself does not proceed upon the theory that because of what was done by appellee the appellant was deprived of any right or opportunity that she otherwise would have had, but rests mainly upon the theory of a fraud practiced upon her by the appellee, whereby all that was done by appellee was done for her benefit. This the-

ory is not supported by the evidence. One may not both repudiate and claim the benefit of a contract.

If appellant's counsel think we should discuss other questions urged by them we can only say that the withdrawal by them, of the transcript from the files of this court, and retention thereof from the time the cause was submitted until the present, affords us abundant reason for not going more into detail concerning some matters.

We see no ground for the appellant to stand upon, and the decree was right. It will therefore be affirmed.

68 622
169 181

James E. Taylor v. Edward W. Bailey and Willard L. Cobb.

1. JUDGMENT—*When the Appellate Court will not Reverse.*—Where the plaintiffs are clearly entitled, under the evidence, to the judgment recovered, the Appellate Court will not interfere, although the instructions were not in strict accord with the law.

Assumpsit, for money advanced. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

STATEMENT OF THE CASE.

This was an action brought in the Circuit Court of Cook County, by appellees, doing business as E. W. Bailey & Co., plaintiffs, against the appellant, James E. Taylor, as defendant, for the recovery of money advanced by Bailey and Company, as commission merchants, upon account of the purchase of 100 shares of Chicago Junction Railway stock for appellant. Upon the trial the defendant, James E. Taylor, offered no evidence, but requested the court, at the close of the plaintiff's case, to instruct the jury to find the issues for the defendant, which motion was denied; the jury rendered a verdict finding the issues for the plaintiffs,

Keith v. Henkleman.

and assessing their damages at the amount claimed—\$2,292.45. Judgment was entered on this verdict, from which judgment an appeal is taken to this court.

WALKER, JUDD & HAWLEY, attorneys for appellant.

TENNEY, McCONNELL & COFFEEN, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant contends that the purchase made for him was to enable him to gamble; that in this design he was knowingly aided by appellee, and that therefore no recovery can be had.

It is sufficient to say that we find in the record no warrant for such contention. Appellant did not see fit to himself testify as to the transaction, or to introduce any evidence.

The plaintiffs were clearly entitled, under the evidence, to the judgment they obtained, and it is not now very important whether the instructions to the jury were in strict accord with the law.

The judgment of the Circuit Court is affirmed.

66 623
173 137

Elbridge G. Keith et al. v. Frederick Henkleman et al.

1. INJUNCTION BOND—*Reformation of, in Equity.*—An injunction bond may be reformed in a court of equity by adding seals thereto, against the sureties as well as against the principal, such bond, by mistake and inadvertence, not having been sealed at the time of its execution.

2. TRIAL BY JURY—*Assessment of Damages on Dissolution of Injunction.*—The respondents in a proceeding to assess damages upon the dissolution of an injunction are not entitled as a matter of right to a trial by jury.

Bill, for an injunction. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

JAMES A. PETERSON, attorney for appellants.

TENNEY, McCONNELL & COFFEEN, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellants, Elbridge G. Keith and William A. Stanton, were sureties for the appellant John L. Peterson on an injunction bond in the suit of the latter against the Bra-brook Tailoring Company and others. Such bond was, by inadvertence and mistake, not sealed, and such mistake was not discovered until at or about the time the injunction was dissolved, in conformity with the opinion of this court in *Henkleman v. Peterson*, 40 Ill. App. 540. Thereupon the obligees in said bond (the appellees here) filed a bill to reform the bond, and to have their damages by reason of the wrongful issuance of said injunction awarded them. The Supreme Court, in *Henkleman v. Peterson*, 154 Ill. 419, held that the bond might be reformed in respect to adding seals thereto, as against the sureties as well as against the principal, and the cause being remanded to the Superior Court, the decree now appealed from was entered.

Only that part of the decree awarding \$1,228.29 damages by reason of the issuance of the injunction, is questioned. Of such sum \$1,000 was for solicitor's fees, and the controversy, as presented to us, is mainly confined to that single item. If there be other contentions they will, with trifling exceptions, stand or fall with the one applicable to the award of solicitor's fees.

When the injunction was dissolved in accordance with the opinion of this court, *supra*, the appellees became entitled to have their damages ascertained for its unlawful issuance.

The fact that the purported bond was unsealed, and therefore not a bond, was then discovered, and interposed itself as a shield to the sureties. This bill thereupon became a necessary preliminary to the ultimate and principal relief to which appellees were entitled, viz., the damages to which they had been subjected.

The reforming of the bond was but incidental, although necessary, to such relief. And its reformation was peculiarly within the sphere of equity. Having taken jurisdiction and reformed the bond, equity might and should proceed to give the complete remedy of ascertaining and awarding the damages sustained, against which the bond was given as protection.

The points made, that the appellees had a remedy at law, and that the appellants were entitled, as a matter of right guaranteed by the Federal and State constitutions, to a trial by jury upon the question of what, if any, damages were sustained by the appellees under the injunction, are not well taken. 2 Beach on Mod. Eq. Jur., Sec. 538; 2 Story's Eq. Jur., Sec. 796; 1 Pomeroy's Eq. Jur., Sec. 181; Continental Ins. Co. v. Ruckman, 127 Ill. 364; Mercantile Ins. Co. v. Jaynes, 87 Ill. 199; Ward v. Farwell, 97 Ill. 593; Flaherty v. McCormick, 113 Ill. 538.

The injunction bond provided in terms for the payment of damages occasioned by the wrongful issuance of the injunction, and also such damages as might be occasioned in case the injunction should be dissolved. The injunction was dissolved before this bill was filed, and the finding in the decree appealed from was that the fees allowed were for services in procuring such dissolution.

That the original bill, upon which the injunction issued, was not dismissed until after this bill was filed, we do not regard as material. Sec. 12 Ch. 69, R. S., entitled "Injunctions;" Garrity v. C. & N. W. Ry. Co., 22 Ill. App. 404; Lindblom v. Williams, 51 Ill. App. 483.

Upon the objection that the fees allowed were excessive, we quote from the decree, as follows:

"The court further finds that the complainants in this cause retained counsel, immediately upon the filing of the said bill in the case of John L. Peterson v. The Brabrook Tailoring Company et al., mentioned in said bond and in the pleadings herein, to obtain the dissolution of said injunction; that said counsel charged to said complainants, and said complainants, on or about June 30, 1891, and prior

to the filing of this bill, paid for the services of said counsel in procuring the dissolution of said injunction, the sum of one thousand dollars (\$1,000), and that said sum was the usual and customary charge for legal services of that character, and was a fair and reasonable charge for the services rendered by said counsel in procuring such dissolution, and that the defendants, John L. Peterson, William A. Stanton and Elbridge G. Keith, are liable on said injunction bond to said complainants therefor."

Such finding was abundantly supported by the evidence, and we do not feel warranted in disturbing it.

We will not undertake to answer in detail all of the technical objections that are interposed to the decree. From an examination of them we are satisfied none of them ought to be allowed to prevail over what seems to be the manifest justice of the decree, which is accordingly affirmed.

West Chicago St. R. R. Co. v. James F. Scanlan, Adm'r.

1. *APPEALS—Prayer for, to Appear in the Common Law Record.*—The appropriate place for the prayer and allowance of an appeal is in the common law record of a case and not in the bill of exceptions.

2. *CONTRIBUTORY NEGLIGENCE—Parent and Child.*—The law does not hold that parents are guilty of such contributory negligence as will prevent a recovery for an accident to a child through the negligence of another.

3. *SAME—A Question of Fact.*—Whether parents are guilty of contributory negligence depends upon the circumstances of the case and is a question of fact for the jury under proper instructions by the court.

4. *INSTRUCTIONS—Error in, Will not Always Reverse.*—Where the defects in an instruction are amply cured by other instructions given in the case, so that considering all the instructions, the whole law of the case has been sufficiently given to the jury, the judgment will not be reversed on account of such defects.

5. *DAMAGES—Death from Negligent Act.*—Where the deceased is a minor and leaves parents entitled to his services, the law presumes a pecuniary loss for which compensation may be given under chapter 70, R. S., and such loss may be estimated from the facts proven in connection with the knowledge and experience possessed by all persons in relation to matters of common observation.

68	626
168	34
68	626
77	177

68	626
101	488

West Chicago St. R. R. Co. v. Scanlan.

6. *SAME—When Excessive.*—A verdict for \$3,500 for the death of a girl three years and eleven months old; the child of working people entitled to her services during her minority, is excessive.

Trespass on the Case.—Death from negligent act. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed if amount of damages is remitted, etc., otherwise reversed and remanded. Opinion filed February 9, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

CASE & HOGAN and MUNSON T. CASE, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee has moved that this appeal be dismissed, because it is not shown in the bill of exceptions that the appeal was prayed for and allowed.

The same order, contained in the record proper, or common law record of the case, that was made overruling the motion for a new trial and giving judgment upon the verdict, shows that the appeal was prayed and allowed to this court. That was all that was required.

The appropriate place for the prayer and allowance of an appeal is in the common law record of a case, and not in the bill of exceptions.

To hold that a bill of exceptions is necessary to preserve for review anything which has its appropriate place in the common law record of a case, would be like holding that appeals would not lie, unless aided by a bill of exceptions, for errors apparent on the face of such record—as, for instance, the sustaining or overruling of a demurrer—which has never been held.

Appellee also moves that the bill of exceptions be stricken from the record, and that the judgment be affirmed.

This motion is based upon supposed irregularities in connection with the signing and filing of the bill of exceptions

in the trial court, and expressions employed in opinions in cases in this court are cited as authority for granting the motion. The last of those cases is that of *N. C. R. R. Co. v. Olds*, 64 Ill. App. 595. In that case the writer of that opinion expressed himself as favoring the motion there made to strike out the bill of exceptions, but, his colleagues not agreeing with him, the case was considered upon its merits as presented by the bill of exceptions.

We observe that two days ago the Supreme Court filed an opinion affirming the judgment entered by this court in that case, and although we have not seen the opinion, it would seem that no such affirmance could have been made without considering that the bill of exceptions was properly in the case. If the bill of exceptions was proper in that case, the one in this case is proper, for the irregularities here complained of were in substance the same as there.

The grounds, therefore, for both of appellee's motions are insufficient, and the case will be considered upon its merits.

The appellee's intestate was a girl three years and eleven months old, in good health and physical condition, and was run over and killed by a horse car operated on Western avenue, Chicago, by the appellant.

Of the numerous errors that are assigned by the appellant, only three are argued, viz., that the verdict was contrary to the evidence; that the verdict was excessive; and that an instruction given for the appellee was erroneous.

While it must be conceded that the witnesses for the appellee did not agree in some particulars with one another, and sometimes did not, on cross-examination, adhere to an entirely consistent account of every detail testified to by them on direct examination, yet as to the main facts there can not in fairness be said to be any uncertainty, and from the whole evidence the jury was justified in finding that the horse car driver was negligent. *C. W. D. Ry. Co. v. Ryan*, 31 Ill. App. 621, and 131 Ill. 474.

Even though a child of such tender age shall go upon the street and play, in the absence of her parents at work—she

having been left at home by her parents when they went away to their work, in the charge of an older sister ten years of age—the law does not say that the parents are guilty of such contributory negligence as will prevent a recovery for an accident to her through the negligence of another. Whether parents, under such circumstances, be guilty of contributory negligence, is a question of fact for the jury, under proper instructions by the court.

The instruction that is objected to was the only one given for the appellee, and is as follows:

“The court instructs the jury that if they find from the evidence that the plaintiff had made out his case by a preponderance of the evidence, as laid in his declaration, then the jury must find for the plaintiff.”

And the objections urged against it are, that it omits the element of the care due by the parents; that it is mandatory, as amounting to coercion upon the jury, in using “must,” and that it omits to give to the jury any rule governing their assessment of damages.

The instruction was bad in every specified particular, except, perhaps, as to its mandatory form. *T., W. & W. Ry. Co. v. Grable*, 88 Ill. 441; *City of Chicago v. Major*, 18 Ill. 349; *L. S. & M. S. Ry. Co. v. Pauly*, 37 Ill. App. 203; *C., E. & L. S. Ry. Co. v. Adamick*, 33 Ill. App. 412; *Garland v. C. & N. W. R. R. Co.*, 8 Ill. App. 571.

And the judgment would have to be reversed, if that instruction were the only one in the case.

But the appellant, by instructions asked and given in its behalf, most amply cured all the defects in the one complained of.

Considering all the instructions, the whole law of the case was sufficiently given to the jury.

The verdict and judgment were for \$3,500.

If we were permitted to consider anything more than the bare pecuniary loss to the next of kin, we could not say the verdict was for too much.

The parents were working people, and worked away from home. The oldest sister was fifteen, and was “living out.”

The presumption is strong that had the deceased lived to a working age, she too would have joined the ranks of wage-earners, and if so, her parents would have been entitled to her earnings during her minority. Such fact should be considered, and when it be given its full weight, the result shows, beyond all effort of calculation to the contrary, that the amount awarded is too large.

Where the deceased is a minor, and leaves parents entitled to his or her services, the law presumes a pecuniary loss, for which compensation may be given under the statute, though without the statute no recovery whatever could be had.

It was said, in *City of Chicago v. Scholten*, 75 Ill. 468, and quoted approvingly in *R. R. I. & St. L. R. R. Co. v. Delaney*, 82 Ill. 198: "In such cases the pecuniary loss may be estimated from the facts proven, in connection with the knowledge and experience possessed by all persons in relation to matters of common observation."

The child was not old enough to apply any other of the elements there referred to, but applying what we have quoted to the case at bar—the death of a healthy girl almost four years old, the child of parents to whom her future possible earnings are likely to be of considerable pecuniary value, and herself presumably to join in adding her earnings to their aid and support as soon as her years would permit—we can not by any calculation, even though we permit ideas of extravagance to come in to aid it, conclude that the actual pecuniary loss to the parents, or next of kin, exceeded two thousand dollars.

If, therefore, the appellee shall, within ten days, remit from the judgment recovered all in excess of two thousand dollars, we will affirm the judgment for that amount; but otherwise, the judgment will have to be reversed and the cause remanded; and, in either event, at the cost of appellee.

Affirmed, if remitted down to two thousand dollars, otherwise reversed and remanded.

Charles F. Milligan v. Zephaniah S. Holbrook.

1. *INDORSER—Can Not be Held as Guarantor.*—A person having contracted to assume the liability of indorser can not be held as a guarantor.

2. *SAME—Liability Different from a Guarantor.*—The liability of an indorser is conditioned; that of a guarantor is more onerous.

Assumpsit, upon a guaranty. Appeal from Circuit Court, Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

G. W. & J. T. KRETZINGER, attorneys for appellant.

ASHCRAFT, GORDON & COX, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant brought suit against appellee, alleging that he guaranteed the note of one R. W. Day for \$8,000, payable to appellant. At the same time suit was brought against Day as maker. By agreement, both suits were tried together without a jury. The court found that appellee was not a guarantor, but a simple indorser, and rendered judgment against appellant.

The instrument under consideration is as follows :
\$8,000.

“CHICAGO, Jan. 2, 1893.

Nov. 1st, '93, after date, I promise to pay to the order of C. F. Milligan, eight thousand dollars, valued received, with interest at — per cent per annum.

This note is not negotiable before maturity.

R. W. DAY.

Indorsed : Z. S. HOLBROOK.”

Day, Holbrook and Milligan testified as to the circumstances under which the indorsement was made, and the conversation before then had by the respective parties.

The court held the following :

"Held, as law in this case, that if the court should believe from the evidence that at the time the name of Holbrook was placed on the back of the note in evidence that plaintiff said in substance to Holbrook, 'You indorse these notes, do you not?' that Holbrook replied, 'I indorse these notes because I consider Mr. Day good, and you have got to exhaust him before you can collect of me;' and that plaintiff replied, 'All right;' and that thereupon Holbrook put his name on the back of the notes and they were delivered to the plaintiff; and if the court should believe from the evidence that no other or different arrangement or language was used than aforesaid, and that no other agreement or understanding was had than that embraced in the language aforesaid, that then and in that case Holbrook, as matter of law, contracted as indorser and not as guarantor, and that this action can not be maintained."

Appellant has no reason to complain of the action of the trial court.

The contract of appellee was, upon sufficient evidence, found to be one of indorsement, not of guaranty.

Having contracted to assume the liability of indorser, he can not be held as a guarantor. *Eberhardt v. Page*, 89 Ill. 550; *Delamater v. Kearns*, 35 Ill. App. 634; *Tatum v. Bower*, 23 Miss. 760; *Russell v. Clarke's Ex'rs*, 7 Cranch, 69.

The liability of an indorser is conditional; that of a guarantor is more onerous. *Daniel on Neg. Instruments*, Vol. 1, p. 528, Sec. 667; and same, Vol. 2, p. 678, Sec. 1754. The judgment of the Circuit Court is affirmed.

68 632
79 375

**Michael B. Bailey, Matilda Bailey, Nellie Bailey, Margaret Bailey, Mary E. Moran, Catherine Kelly
and Harry L. Bailey v. Hetty H. R. Green
and Hetty S. A. H. Green.**

1. FORECLOSURE—*Different Mortgages on Different Premises—Decrees.*—A decree upon a bill to foreclose a trust deed upon certain premises, and a cross-bill to foreclose a junior mortgage upon the same

Bailey v. Green.

and other premises, which orders the sale of the property covered by such mortgages unless there is paid the amount due upon each, is erroneous.

Foreclosure of trust deed. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded, with directions. Opinion filed February 9, 1897.

STATEMENT OF THE CASE.

This was an action brought by appellee Hetty H. R. Green against appellants and others (including the appellee Hetty S. A. H. Green), to foreclose a trust deed upon lot 32 in John Johnson, Jr's, subdivision of block 4 in Vernon Park addition to Chicago, given to secure a note for \$5,500, dated May 9, 1885, payable five years after date, executed by appellant Michael B. Bailey and Ellen Bailey, his wife. Hetty S. A. H. Green, on August 29, 1895, filed a cross-bill to foreclose a junior trust deed upon said lot 32, and also lots 74 and 75 in Macalester's resubdivision of block 49, in Canal Trustees' subdivision, given to secure a note for \$1,500 dated January 2, 1891, payable five years after date to Hetty H. R. Green, in trust for Hetty S. A. H. Green, executed by said Michael B. and Ellen Bailey, Ellen being the owner of all of said premises.

Answers having been filed and issue joined, the cause was referred to a master, who took testimony and reported that the complainant and cross-complainant were respectively entitled to the relief by them respectively prayed. Exceptions to the report were overruled by the court, and it found that there was due cross-complainant \$2,497.70, subject to a lien of Hetty H. R. Green for \$8,307.17 on the premises described in her bill of complaint; that said Ellen Bailey died testate, November 30, 1892, and letters testamentary were issued on her estate to said Michael B. Bailey; that Michael B. Bailey signed said principal and interest notes, and the trust deeds securing same, individually, and is liable for amounts due to complainant and cross-complainant; and ordered that if defendants, or some of them, did

not pay to the complainant Hetty H. R. Green, within two days from date of decree, said sum of \$8,307.17, and to the cross-complainant Hetty S. A. H. Green, said sum of \$2,497.70, with lawful interest from the date of the decree until paid, and costs of this suit, the premises described in the bill of complaint and in the master's report, to wit, lot 32, in John Johnson, Jr.'s, subdivision of block 4, in Vernon Park addition to Chicago, also the premises described in said cross-bill to wit: Lots 74 and 75 in Macalester's resubdivision of block 49 of the west half of the west half of the northeast quarter of section 17, township 39 north, range 14 east of the third principal meridian, or so much thereof as may be sufficient to pay amounts due complainant and cross-complainant, and costs, be sold at public auction by Edward A. Dicker, master; that out of the proceeds of sale, the master pay to the complainant Hetty H. R. Green the amount found due under the decree to her if, after paying costs, etc., the remaining proceeds are sufficient, and apply the remainder in satisfaction of amount due cross-complainant, and report the deficiency, if any, and bring the surplus, if any, into court; and it was further ordered that Michael B. Bailey, executor, pay any such deficiency, in due course of administration, and that execution issue against said Michael B. Bailey individually therefor.

CHYTRAUS & DENEEN and WM. S. YOUNG, attorneys for appellants.

WILLIAM B. CUNNINGHAM and BATES & HARDING, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The decree is erroneous, in that it orders the sale of the property covered by each mortgage unless there is paid the amount due upon each. The decree should have ordered a sale, first, of lot 32, unless there were paid to Hetty H. R. Green the amount due upon her mortgage, and ordered a

Pennsylvania Co. v. McCaffrey.

separate sale of lot 32 and lots 74 and 75, unless there were paid to Hetty S. A. H. Green the amount due upon her mortgage.

The court should also have equitably apportioned the amount of costs and fees properly taxable and chargeable between the several properties; a certain proportion thereof to be paid, or said lot 32 would be sold upon the decree upon the mortgage belonging to Hetty H. R. Green, and a certain proportion thereof to be paid, or said lot 32 and lots 74 and 75 would be sold upon the decree upon the mortgage belonging to Hetty S. A. H. Green. If the proceeds of the first sale of lot 32 more than discharged the claim of Hetty H. R. Green, the surplus should be applied in reduction of the amount due Hetty S. A. H. Green. *Brown v. Kennicott*, 30 Ill. App. 89.

We find no other error.

The decree of the Circuit Court is reversed, and the cause remanded, with directions to enter a decree in accordance with the opinion of this court.

Reversed and remanded, with directions.

Pennsylvania Company v. Daniel J. McCaffrey.

68 635
173 169

1. CONTRIBUTORY NEGLIGENCE—*Not Connected with Acts Com-
plained of.*—An act of contributory negligence on the part of the plaintiff not connected with the act resulting in an injury to him will not prevent a recovery.

2. INSTRUCTIONS—*When Properly Refused.*—An instruction which tells the jury what acts or omissions constitute negligence or the reverse is properly refused.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. EDMUND BURKE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

GEO. WILLARD, attorney for appellant.

DUNCAN & GILBERT, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant for injuries by him received as he alighted from a north-bound train of the appellant and was struck by a locomotive going south on an adjacent track. One of the questions on the trial was whether the train from which he alighted had come to a stop before he left it.

Another was whether he was negligent in leaving the train on the west side of it, where there were other tracks, when he might have left it on the east side of it, where there were no other tracks. The brief of the appellant concedes that the appellee alighted at Twenty-second street, and the evidence is that while there was a station house which, by the scale of the map, may be about twenty-five by thirty feet in plan, and fifty feet from the track, some three hundred feet north of the place where the appellee alighted, yet the surface of the ground there on both sides of the track was substantially in the same condition.

It is quite certain, that at the time there was but little daylight, and that from a south-bound train, a passenger, leaving it at Twenty-second street, would probably alight where the appellee alighted.

It is also certain that if the train was not at rest when the appellee alighted, it was very slowly just coming to, or starting from a stop, and therefore the danger to persons leaving the train from running a locomotive by the train, on the next track, was much the same in either case.

If the appellee was negligent, his contributory negligence consisted, not in leaving a train in motion, or leaving it on the wrong side—neither of which acts resulted in any injury to him—but in going upon an adjoining track, where, under the circumstances at the time, he had no reason to suspect the approach of any locomotive. *Lake Shore & M. S. Ry. v. Ward*, 35 Ill. App. 423; *Pennsylvania Co. v. Keane*, 41 Ill. App. 317.

The complaint in the brief of the appellant that instructions asked were improperly refused, is answered by the statement that such instructions told the jury what acts or

Crikelair v. Citizens Insurance Co.

omissions constituted negligence or the reverse—which the jury and not the court is to determine. *Chicago & N. W. Ry. v. Traves*, 33 Ill. App. 307; *Wald v. Pittsburg, C., C. & St. L. R. R.*, 162 Ill. 545.

The criticism of the action of the court upon questions of evidence, may be, in some instances, theoretically just, but practically of not the slightest importance.

The facts which entitled the appellee to recover are not involved in any doubt.

The judgment is affirmed.

63 637
138 309

**Frank Crikelair and Mary Crikelair, Copartners as F.
Crikelair & Co. v. Citizens Insurance Co.**

1. *INSURANCE—Conditions of the Policy Binding.*—Where there is no written application, and no knowledge on the part of the insurer or its agent of the existence of a chattel mortgage upon the property sought to be insured, which the policy declares shall render it void, the insured is bound by the conditions of the policy which he accepts. The fact that no representations are made by the insured regarding the chattel mortgage can not do away with the conditions of the policy.

2. *SAME—Insured Presumed to Know Contents of the Policy.*—Upon receipt of a policy of insurance by the insured the contract of insurance is completed in all its terms, and binding upon both parties. The assured accepts it with all its conditions and limitations, and is conclusively presumed to know its contents.

3. *SAME—No Representations Made by the Insured.*—The fact that no questions were asked of the insured by the agent who wrote the policy, and no representations were made by the insured regarding the incumbrance upon the property, can not do away with the conditions of the policy.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

BULKLEY, GRAY & MORE, attorneys for appellants.

BATES & HARDING, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The policy of insurance sued upon contained the following provision:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

It is admitted that the subject of insurance was personal property, and that at the time the policy of insurance was taken out, and also at the time the fire occurred, the property was incumbered by a chattel mortgage that remained unpaid; that no disclosure of the fact was ever made to appellee or to any of its agents, and that no person connected with appellee ever had actual knowledge of the chattel mortgage until after the fire occurred. Such mortgage covered the personal property mentioned in said policy, and all of it; and was for the sum of \$700.

The question that appellants have argued is one of law merely—whether or not, because of such clause in the policy, and of the facts stated, the policy was void.

The court below, who tried the cause without a jury, held that it was void, and gave judgment for the insurance company, and this appeal has followed.

The contention is, that the defendant company, by writing the insurance and issuing the policy, is estopped; that the contract was made with reference to the then existing condition of the property, and that in the absence of fraud or deception, or false representations, the defendant has waived such provision of its policy.

And in furtherance of such contention the trial judge was asked, but refused, to hold, as a proposition of law, as follows:

"The court finds, from the evidence in this case, that at the time the plaintiff applied to the agents of the defendant for the policy of insurance sued on in this case, that there was a chattel mortgage upon the property insured, and that the defendant had an opportunity to learn of the existence

Crikelair v. Citizens Insurance Co.

of such mortgage, if its agents did not then know of it, but that the said agents made no inquiries regarding such chattel mortgage at the time of effecting the insurance on said property, and that no deception of any kind was practiced by the plaintiffs on the defendant or its agents; and thereupon the court holds as a proposition of law that the defendant company consented to the insuring of the mortgaged property as effectually as if a written indorsement to that effect had been made upon the policy itself; and that therefore the policy was and is a valid policy."

The facts stated in the proposition are substantially in accord with the proofs, and it is insisted that it was error not to hold the law, upon the facts, to be as embodied in the proposition.

There has been some contrariety of opinion among the courts upon the law in such a case, but we feel constrained to hold that the weight of authority and of reason is the other way, and that the propositions of law asked and held for the appellee stated the correct doctrine.

Where there is no written application, and no knowledge on the part of the insurer, or its agent, of the existence of a chattel mortgage which the policy declares shall render it void, the insured is bound by the conditions of the policy which he accepts. The fact that no representations are made by the insured regarding the chattel mortgage can not do away with the conditions of the policy.

Upon receipt of a policy of insurance by the insured the contract of insurance is completed in all its terms, and binding upon both parties. The assured accepts it with all its conditions and limitations, and is conclusively presumed to know its contents, and the fact that no questions were asked of the insured by the agent who wrote the policy, and no representations were made by the insured regarding the incumbrance upon the property, can not do away with the conditions of the policy.

It would seem that the law of Wisconsin, the State where the property was situated and the insurance contract entered into, should be given controlling weight, and we interpret

the decisions of the Supreme Court of Wisconsin to be in support of the judgment before us. *Wilcox v. Continental Insurance Company*, 85 Wis. 193, and cases there cited; see also *Dwelling House Ins. Co. v. Reynolds*, 41 Ill. App. 427.

The judgment is affirmed.

68 640
170 135

**International Building, Loan and Investment Union v.
Ellen Duffey King.**

1. BUILDING AND LOAN ASSOCIATIONS—*Issue of Unauthorized Stock*.—A building and loan association, organized under the laws of this State, has no power to issue a certificate of stock containing a promise to pay the holder \$3,100 at the end of six years from its date.

Assumpsit, upon a certificate of stock issued by a building and loan association. Appeal from the Superior Court, Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1896. Reversed. Opinion filed February 9, 1897.

ALLAN C. STORY and RUBENS & MOTT, attorneys for appellant.

GEORGE W. BROWN, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit, brought by a stockholder upon a stock certificate for twenty shares, against appellant, a building society organized under the homestead and loan act, to recover \$950.

The certificate contained a promise to pay the shareholder, or assigns, \$100 for each of twenty shares, at the end of six years from the date thereof.

The issue of such certificate was unwarranted by the law under which appellant was created and acted. *Wierman v. International Building & Loan Ass'n*, 67 Ill. App. 550.

The judgment of the Superior Court is reversed.

MR. JUSTICE GARY.

The majority of the court having overruled me in the case cited, the law of the court is established, and I concur in this decision.

William F. Gorrell v. Charles H. Payson.

68 641
170 213

1. VERDICTS—*Upon Conflicting Evidence*.—A verdict upon conflicting and irreconcilable evidence, when there is enough on either side standing alone to make a case, is conclusive.

Assumpsit, for attorney's services. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Mr. Justice WATERMAN dissenting. Opinion filed February 9, 1897.

FRANK L. KRIETE, attorney for appellant.

MANN, HAYES & MILLER, attorneys for appellee; JAMES R. MANN, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The parties to this suit made an agreement as follows:

"FAIRLANDS, August 8, 1892.

C. H. PAYSON: After consulting attorneys in Chicago, we have decided to take you in the case against the Home Life Insurance Company of New York, brought by myself for \$130,000. If we collect the full amount, I will give you \$15,000, and for any less sum recovered, will give you as fees, a sum in the same proportion the amount received bears to the amount sued for.

W. F. GORRELL.

This agreement is accepted by me this day.

C. H. PAYSON."

Thereafter, for nearly eighteen months, the appellee spent much of his time in attention to business in which the

appellant was interested other than that mentioned in that agreement. He sued to recover compensation for such other services. The question of fact between the parties—aside from the amount of such compensation, if the appellee was entitled to it—was whether the appellee was to be paid only his expenses when rendering such services, his object being to win reputation, or was entitled to fair money compensation for them.

On this question the evidence was conflicting and irreconcilable—enough on either side to make a case if standing alone—and the verdict of the jury is conclusive. One who desires to read that proposition stated in more words can easily gratify his wish by searching the volumes of Illinois Reports, since the act of July 21, 1837, provided that “exceptions taken to opinions or decisions of the Circuit Courts overruling motions in arrest of judgment, motions for new trials, and for continuances of causes, shall hereafter be allowed; and the party excepting may assign for error any opinion so excepted to, any usage to the contrary notwithstanding.”

The minor criticisms upon admitting or excluding testimony during the trial, we dismiss with the remark that it is impossible to believe that the result was thereby affected.

By instructions the issue was clearly presented, though by the course of the evidence it must have been perfectly apprehended by the jury before the instructions were read.

The only instruction for the appellee, of which the appellant complains, is as follows:

“The court instructs the jury that if they believe, from the evidence, that the plaintiff, Payson, rendered services for the defendant, Gorrell, and that said services were performed for the benefit of said defendant, with his knowledge and consent, then a request will be implied; and unless the jury further believe from the evidence that such services were performed as a gift or gratuity, then the plaintiff is entitled to recover what the jury may believe from the evidence such services were reasonably worth, according to the usual, customary and ordinary charges made by lawyers for such services, if any, shown in the evidence.”

And presenting the view of the appellant upon the same issue, at his request, was this instruction:

"You are instructed that if you believe from the evidence in this case that the plaintiff rendered services in the criminal trial, and in the conspiracy trial in the United States court, to the defendant, in pursuance of a request by the plaintiff of the defendant, and the defendant's assent that the plaintiff should be permitted to take part in said trials gratuitously for the plaintiff, for the reputation which the plaintiff might gain thereby, then, and in that case, the plaintiff is not entitled to recover anything for his fees or compensation for services so performed."

On the whole case, whether justice is done or not, the law has not been violated, and the judgment is affirmed.

MR. JUSTICE WATERMAN dissents.

Vierling, McDowell & Co. v. Iroquois Furnace Co.

1. **IMPEACHMENT**—*Inconsistent Statements Out of Court*.—A witness may be impeached by showing that before the trial he had made statements as to facts inconsistent with the testimony he has given as to the same facts, but he can not be impeached by putting in his statements first and then calling witnesses to contradict them.

2. **INTEREST**—*On Damages for Breach of Contract*.—Interest on damages for a breach of a contract, from the time of the breach, is allowable under the rule in *Murray v. Doud*, 63 Ill. App. 247.

Assumpsit.—Breach of contract. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

MAHER & GILBERT, attorneys for appellant.

McMURDY & JOB, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

These parties made contracts for the sale of pig iron by the appellee to the appellant, and this suit was brought by

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the appellee to recover damages from the appellant for refusing to take all the iron contracted for.

The appellee recovered the difference between the contract and market price on 612 tons.

The first question is, whether the contracts—for there were more than one—were for two lots, or three lots, of 500 tons each—for 1,000 or 1,500 tons.

And the second question is upon the quality of the iron.

Upon these questions the verdict of the jury in favor of the appellee, in accordance with what appears to be the preponderance of the evidence, is final.

The course of the business was that the appellee first sent sample of trial cars of the iron, which were tested by the appellant before it ordered quantities, so that in effect the sales were by sample.

The first contract was in writing, silent as to quality; the other or others were inferable from conduct, and acquiescence in statements in correspondence—letters from appellee to appellant; but the sales being in fact by sample, the only question on the quality would be, was the iron up to sample; and all evidence of parol representations or guaranties made before the first contract of what the quality would be was incompetent. *Hanson v. Busse*, 45 Ill. 496.

The appellant was not restricted in its evidence as to the quality of the iron, or in its efforts to show the inferiority to that of the trial cars.

One of the witnesses for the appellee, in testifying on cross-examination as to a conversation he had held with an agent of the appellee, said that he (the witness) had told the agent that the iron was giving universal satisfaction elsewhere; and upon that foundation the appellant claimed the right to go into detail to show the absence of universal satisfaction.

A witness may be impeached by showing that before the trial he had made statements as to facts inconsistent with the testimony he has already given as to the same facts; but he can not be impeached by putting in his statements first and then calling witnesses to contradict them. He had

Bornhofen v. Greenebaum.

not testified that the iron had given universal satisfaction, but only that he had told a man so.

Interest on the damages from the time of the breach of the contract was allowed in accordance with *Driggers v. Bell*, 94 Ill. 223, cited in *Murray v. Doud*, 63 Ill. App. 247.

There is no error, and the judgment is affirmed.

Nick J. Bornhofen, Annie Bornhofen and Charles F. W. Kleene v. David S. Greenebaum.

68 645
167 640
167 646

1. EVIDENCE—*Inferences from Matters Withheld*.—The truth of a contested matter may sometimes be arrived at by a consideration, not only of what was adduced in evidence, but of what the parties having the power to produce withhold.

2. FRAUD—*May be Proved by Circumstances*.—The court discusses the evidence and finds that the decree of the court below is based upon forged notes, and that the alleged makers of the same have not been guilty of any negligence or conduct by which they are estopped to deny the genuineness of such notes.

Foreclosure, of a trust deed. Appeal from the Superior Court of Cook County: the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and a decree entered in this court dismissing the bill. Opinion filed February 9, 1897.

ALBION CATE, attorney for appellants.

SIMEON STRAUS, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree for the foreclosure of a mortgage, by way of a trust deed, claimed to have been made by Nick J. Bornhofen and Annie Bornhofen, his wife.

Upon the trial of the cause it appeared that about January, 1894, Nick J. Bornhofen applied to William J. Haerther, a mortgage broker, for a loan of \$1,500 for three years,

on his, said appellant's, homestead, being number 1620 Addison avenue, Chicago. Haerther agreed to make the loan; thereupon Bornhofen and his wife executed a trust deed of said premises, dated January 16, 1894, running to Haerther as trustee, which deed was by the grantors duly acknowledged on the evening of January 17th, 1894, before John F. Schenuit, a notary public, then Haerther's book-keeper.

Said trust deed was to secure one principal note for \$1,500 and six interest notes, all to the order of Nick J. Bornhofen, which notes were by him at the same time made, indorsed and delivered to Haerther. Haerther, having taken these securities, filed the trust deed for record, February 1, 1894.

December 21, 1894, Mr. Bornhofen received from C. J. Hambleton a letter informing him that he, Hambleton, had purchased and held the \$1,500 note and mortgage, together with the interest notes maturing January 1, 1895, and thereafter. This was the first information Bornhofen received of the transfer of the notes and mortgage made as aforesaid by him, Bornhofen. Of the \$1,500 agreed to be loaned to him, and for which he gave his note, Bornhofen received only \$503, although he made many applications to Haerther for the payment of the balance of the loan, being put off by one excuse and another—sometimes that there was some defect in the abstract of title—and being indebted to one Kleene, from whom he had purchased the property for something over \$900, as a balance of the purchase money he obtained from Kleene an agreement that he, Kleene, would receive Haerther's judgment note in payment of the balance due him, Kleene. Thereupon, Bornhofen agreed to take from Haerther his, Haerther's, judgment note for the balance on the loan he, Haerther, was owing him, Bornhofen.

Haerther gave his note, but declined to annex thereto a warrant of attorney to confess judgment, telling Bornhofen to take it as it was, and try Kleene and see if he would not accept it. Haerther did take such note to Kleene, and endeavored to have him accept it, but Kleene refused so to do.

Bornhofen v. Greenebaum.

The trust deed for which the decree appealed from was in foreclosure of, was not, nor were the notes secured by it, that or those heretofore mentioned.

The first intimation that Bornhofen received that any other notes or trust deed, purporting to be executed by him or his wife, were in existence, was in January, 1895, when somebody from the banking house of Kozminski & Company, for the owners of the securities which the decree in this case is based upon, came to Bornhofen's office, at 1877 North Clark street, and exhibited to him two of the notes secured by the trust deed held by Kozminski & Company, asking him if they were his, to which he replied that they were not. By the evidence in this cause, it appears that about the middle of February, 1894, Haerther went to the office of Kozminski & Company, offering to sell the trust deed and notes heretofore mentioned as executed by Bornhofen and wife January 16, 1894. Kozminski & Company, after looking at the property, advanced to Haerther \$1,000 upon it, he saying that he wished a temporary loan to that amount, and afterward Kozminski & Company purchased the securities executed as aforesaid on the 16th day of January, 1894, giving to Haerther therefor, in addition to the \$1,000, \$482, which last mentioned sum was paid on the 28th of February, 1894.

When Kozminski & Company agreed to purchase this security, they told Haerther that they preferred having the mortgage made out on their own sets of papers, to make it more negotiable. They therefore handed to Haerther blank forms of trust deed and notes, such as they were using, in order that he might have new papers executed upon such forms. Haerther took these forms, and returned them on the 28th of February, having thereon a trust deed, apparently executed by Bornhofen and wife, and acknowledged before him, Haerther, as a notary public, together with a note for \$1,500, and coupon interest notes apparently executed by Nick J. Bornhofen, the same being described in the trust deed as secured thereby. This trust deed and these notes Haerther delivered to Kozminski & Company at

the time he received the final payment made to him of \$482, and then received from Kozminski & Company, the genuine trust deed and notes made by Bornhofen and wife, as aforesaid. The principal note thus delivered by Kozminski & Company to Haerther had nearly three years to run, and none of the coupon notes were then due. Without canceling the same, or putting any mark thereon indicating that they were, by the giving of new securities, paid or satisfied, Kozminski & Company delivered them to Haerther, who took them away, and thereafter pledged them, with other securities, to Mr. Hambleton as security for a loan of \$2,500.

Mr. Bornhofen, after the notice by him received from Mr. Hambleton, regularly paid to him the interest coupon notes made January 16, 1894, as they became due. At the time of the hearing of this cause, only two of such coupon notes were outstanding, they not being then due.

At the time Haerther delivered to Kozminski & Company the trust deed which this action was brought to foreclose, he gave to Kozminski & Company a deed releasing the lien of the trust deed executed by Bornhofen and wife January 16, 1894. This release deed was executed by him, Haerther, he being the trustee named in said trust deed. The trustee named in the deed which Haerther gave to Kozminski & Co. and which the decree under consideration forecloses, was Maurice W. Kozminski. The release deed heretofore mentioned was filed for record March 2, 1894, being dated March 1st.

Bornhofen repudiated the trust deed and notes given to Kozminski & Co. February 28, 1894, as aforesaid; and refusing to make any payment thereon, December 21, 1895, David S. Greenebaum, as the representative of Kozminski & Co., and for their benefit, filed a bill to foreclose the last mentioned deed.

Upon the hearing, the foregoing appearing, Nick J. Bornhofen and Annie Bornhofen denied positively and unequivocally, the execution of the trust deed taken by Kozminski & Company February 28, 1894, as aforesaid, and

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Mr. Bornhofen also denied having executed any of the notes which said trust deed purports to secure. Each of the Bornhofens also denied ever having had any notice or knowledge of the making of such trust deed and notes, or any desire that they or either of them should execute the same, until in January, 1895, when two of such notes were presented to Mr. Bornhofen to know if they were made by him, as before mentioned.

Mr. Schenuit, the notary public before whom the trust deed executed January 16, 1894, was acknowledged, testified that being at the time of such execution a bookkeeper of Mr. Haerther, he saw Mr. Bornhofen write his name to the notes and the trust deed then made; that this was the only time he had ever seen him write; that therefrom he believed that the signatures, "Nick J. Bornhofen," on the trust deed and notes now held by Kozminski & Company, are the signatures of Nick J. Bornhofen, defendant.

One Henry L. Tolman, a microscopical handwriting expert, testified that he had examined and compared the signatures of Mr. and Mrs. Bornhofen upon the trust deed and notes by them executed January 16, 1894, and those upon the trust deed and notes sought in this suit to be foreclosed, and from such examination is of the opinion that the two sets of notes are signed by one and the same parties, and that the signatures, "Annie Bornhofen," to each of the trust deeds is by the same person.

There was also in evidence an application for the loan agreed to be made by William Haerther, and for which the trust deed executed January 16, 1894, was given, which application was signed by Nick J. Bornhofen. Mr. Tolman also examined this, and was of the opinion that the signatures, "Nick J. Bornhofen," upon the trust deed and notes held by Kozminski & Company, were made by the same hand that wrote the signature to said application.

Prior to the bringing of the present suit, Bornhofen brought a bill for the purpose of canceling and enjoining the collection of the papers made by him January 16, 1894, and a decree in that case was entered to the effect that, as

between the parties to that controversy, Hambleton and Haerther on the one side and Bornhofen on the other, the papers were good only for the \$503.15, the entire sum which Bornhofen had received thereon, and interest, in all amounting to the sum of \$562.28; but as to the rest of the world, said trust deed and notes are a valid and subsisting first lien upon said premises, according to their tenor. That on or about the first day of March, 1894, said Haerther, trustee in said trust deed, without complainants' knowledge or consent, fraudulently and illegally released said trust deed, and that said trust deed is a valid lien in full force, according to its terms, notwithstanding said release, and that Haerther fraudulently converted said securities to his own use. That Hambleton, upon receipt of \$562.28, deliver said trust deed and notes to complainant (Bornhofen) or to Albion Cate, his solicitor. It also appeared that criminal proceedings had been instituted against Haerther for his conduct in the premises.

The court below found that the securities given to Kozminski & Company by Haerther, on the 28th of February, 1894, as aforesaid, were executed by Bornhofen and wife, as they purported, and a decree for the foreclosure of the same was entered, from which this appeal is prosecuted.

From a careful consideration of the record here presented we are of the opinion that the signatures, "Nick J. Bornhofen" and "Annie Bornhofen," upon the trust deed and notes held by Kozminski & Company, which this action was brought to foreclose are forgeries. If they are the genuine signatures of Nick J. Bornhofen and his wife, then such fact necessarily was and is known to William J. Haerther; he it was who was interested in having new papers made; he had been informed by Kozminski & Company that they wished papers prepared upon their forms. Haerther was obtaining money from Kozminski & Company for his purposes, not as an agent of the Bornhofens, or for their or either of their use.

In order to induce them to execute new papers, and more especially new and additional papers covering the same loan,

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at a time when a month and a half had elapsed since the execution of the first, yet without his, Haerther, who made the original loan, having paid thereon but one-third of the amount of the same, it is evident that he must have not only applied to Mr. and Mrs. Bornhofen, but must have made a very considerable and plausible explanation to induce them to execute, under such circumstances, such additional papers. Moreover, the additional trust deed purports to have been acknowledged before him, William J. Haerther, as notary public. He received the notes, if from Nick J. Bornhofen at all, either directly or by the hand and through the agency of some third party. In whatever way he obtained the trust deed and notes from the Bornhofens, he was a competent witness to testify as to all the circumstances, all that was said and done by which the Bornhofens were induced to execute and deliver to him these additional papers without receiving the first ones in place thereof. Manifestly, under the positive and unequivocal denial made by the Bornhofens, it was for Kozminski & Company to establish the validity of the instruments under which they claim, and as they had received them from the hand of Mr. Haerther it was most natural that they should call him as their witness. This they did; their examination of him, however, was restricted to three questions: First, if he was acquainted with Nick J. Bornhofen, the defendant; second, if he knew the signature attached to the application for the loan agreed to be made by him, Haerther, to secure which loan the trust deed executed January 16, 1894, was made; to which he answered that he did. He was then asked how he knew it, to which he replied that he saw Nick J. Bornhofen sign it. His cross-examination was confined to the matter concerning which he had been examined in chief, which was a thing about which there was no dispute.

It is quite evident that Kozminski & Company did not think best, doubtless were well advised, that it was not prudent or expedient to subject Mr. Haerther to a rigid cross-examination concerning the circumstances and details surrounding his obtaining the two sets of papers from the

Bornhofens. It was natural that the defendants should not call upon Haerther to testify as to this matter, when, from the very nature of the case, it was impossible that he should do other than insist that the signatures were genuine, or confess himself guilty of a crime which would consign him to the penitentiary.

The truth as to a contested matter may sometimes be arrived at by a consideration, not only of what was adduced in evidence, but what parties, having the power to produce, withhold.

Mr. and Mrs. Bornhofen either told the truth when they denied these signatures, or they were guilty of willful, deliberate and corrupt perjury. The character and standing of neither has been assailed. Against their testimony stands only the evidence of two experts; one the bookkeeper of William J. Haerther, before whom, as a notary public, the genuine trust deed was acknowledged, and who saw Mr. Bornhofen sign his name to the genuine notes; the other, a microscopical expert, who testifies by a comparison of the signatures.

We do not impute to either of these experts any design to do otherwise than fairly state the opinion which each held. In reversing the decree of the court below we do not impute perjury to any witness. That experts as to handwriting may be honestly mistaken is obvious.

It is urged by appellee that the certificate of William J. Haerther, the notary public before whom the trust deed held by Kozminski & Company purports to be acknowledged, is conclusive to the same extent that is a record, and the language of this court in a former case is cited, in which it was said such certificate can only be overcome by the strongest and most unequivocal testimony; by evidence that is clear and convincing beyond a reasonable doubt; by evidence of the clearest, strongest and of the most convincing character, and by disinterested witnesses; by evidence that is full, clear and satisfactory, and that, like a record, it can only be impeached for fraud.

If the right of Kozminski & Company to the decree which,

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in the name of David S. Greenebaum, they have obtained, were dependent only upon the trust deed they held, the certificate of acknowledgment of the same by William J. Haerther might be conclusive; but the decree is based, not alone upon such trust deed so acknowledged, but upon the assumed validity of notes made by Nick J. Bornhofen. If Kozminski & Company had no genuine notes secured by such trust deed, if there were never and are not any notes made by Nick J. Bornhofen which said trust deed purports to secure, then the essential foundation of the decree under consideration fails. The evidence as to the existence of such notes rests upon the positive testimony of Nick J. Bornhofen and wife on the one hand, and the opinion of two experts as to handwriting upon the other. It is impossible that Nick J. Bornhofen and Annie Bornhofen should be mistaken as to this matter, while it is easy that such should be the case as to the experts.

In our judgment, all the circumstances surrounding this transaction tend to show that the trust deed and notes for the foreclosure of which the decree under consideration was entered, are forgeries. It is very unlikely that Mr. Bornhofen would, a month and a half after he had delivered the genuine instruments, and when he had received but \$503 of the money due him thereon, have executed additional securities to take their place, and entrusted them to the man who was so greatly in default, without at the same time getting possession of the securities already outstanding. Nor does it seem probable that with all the annoyance and suspicion which must have come to Nick J. Bornhofen from the default of William J. Haerther in paying him but one-third of the \$1,500 which he agreed to loan, and which he had received the securities for, Mr. Bornhofen would have executed and delivered to William J. Haerther additional securities and rested easy. It would have been most natural for him to have been continually inquiring, under such circumstances, not only why the thousand dollars in money coming to him was not handed over, but also why the first set of securities were not returned. Even after the notice sent to

him December 21, 1894, by Mr. Hambleton, that the genuine securities had been transferred, Bornhofen does not seem to have been alarmed, as he unquestionably would have been had he then known that there were outstanding negotiable double securities for the same indebtedness.

Counsel for appellee argue that Haerther was the agent of Bornhofen, and Bornhofen clothed him with *indicia* of ownership of his notes, and therefore must suffer the loss occasioned by the dishonesty of his own agent.

Such contention assumes the very point in controversy, namely, that the notes held by Kozminski & Co. were executed by Bornhofen, and were by him delivered to Haerther. The undisputed evidence upon this matter is that Haerther, for his own purposes and not even as an assumed agent of Bornhofen, desired to procure, first, a temporary loan of \$1,000, and next, to sell the genuine securities executed by the Bornhofens, and that afterward having, as requested by Kozminski & Company, given to them what he claimed were other securities executed by the Bornhofens, Kozminski & Company surrendered to him the genuine notes made by Nick J. Bornhofen and wife, then having nearly three years to run, without marking the same in any way, so that Haerther could not, as he afterward did, dispose of the same for his own fraudulent purposes. Kozminski & Company knew that in what Haerther did he was acting for himself, that the notes of Nick J. Bornhofen which were surrendered to Haerther were paid, if the notes and trust deed then brought by Haerther and given to Kozminski & Company were genuine. Kozminski & Company had no right to assume, as they did, that Haerther would at once deliver the genuine notes to Nick J. Bornhofen. Even if they had been informed by William J. Haerther that he was the agent of Nick J. Bornhofen to take back to him his notes, they had no right to assume that he was such agent, to take into his custody discharged and satisfied notes without having marked thereon that which would have shown that they were no longer existing securities. It is Kozminski & Company who, by their

negligence, enabled Haerther to perpetrate the fraud he did. Had Kozminski & Company exercised common prudence or had proper thought and consideration for the rights and interests of Nick J. Bornhofen, they would have marked his notes paid before they delivered them to William J. Haerther. Kozminski & Company were careful to secure a deed releasing the lien of the trust deed first brought to them, but exercised no care to see that the notes of Nick J. Bornhofen were not left in a condition where they might be, as they afterward were, fraudulently disposed of by Haerther.

While no suspicion exists that Kozminski & Company, or any one connected with them, contemplated for a moment the perpetration of the fraud by Haerther, nevertheless, it was the negligence of this firm that enabled Haerther to do what he did.

Attention is called to the following statement in the answer of Nick J. Bornhofen, and it is said that he does not unequivocally deny the execution of complainant's papers :

"That neither he nor his wife executed, acknowledged or delivered the deed and notes in bill of complaint mentioned; that they were entirely without consideration, or their execution was obtained by fraud such as to render them void in the hands of any holder; that said trust deed and notes were fraudulently concocted or procured without any consideration by said Haerther, and delivered to said Kozminski & Company, and are merely a duplicate set of papers for the same loan evidenced by said trust deed to Haerther and the notes secured thereby."

The answer of Nick J. Bornhofen was drawn and signed for him by his solicitor. The additional statement therein made, was evidently inserted by the solicitor as a matter of caution; knowing, as he presumably did, how much iniquity Haerther had been guilty of, he felt that it was possible the Bornhofens had been fraudulently deluded into signing more and other papers than they were aware.

Being satisfied that the decree under consideration is based upon forged instruments, and that neither Bornhofen or

his wife have been guilty of negligence or conduct by which they are estopped to deny the genuineness of the notes upon which the order of the court below is based, the decree of the Superior Court is reversed, and a decree will be here entered dismissing the bill of appellee. Reversed, and decree entered here.

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Home Savings Bank and C. K. G. Billings, Trustee, v. Mary Stewart Bierstadt.

1. **SUBROGATION—*The Term Defined.***—Subrogation is the substitution of another in the place of a claimant to whose rights such other succeeds, in relation to a claim which has been paid by him, as a matter of right or privilege, and not as a mere voluntary act.

2. **SAME—*Who May Pay an Incumbrance, etc.***—The general rule is that any person having an interest in property upon which there is an incumbrance, may, if necessary for his own protection, pay off the same and be substituted to the rights and remedies of the holder of the incumbrance.

3. **SAME—*Who is Entitled to be Subrogated.***—One who advances money to pay off an incumbrance, upon the agreement with the debtor that the security shall be assigned to him, or a new one upon the same premises or property given to him, will be subrogated to the rights of the incumbrancer, and if the new security turns out to be defective he will be given the benefit of the prior incumbrance unless the superior or equal equities of others will be prejudiced thereby.

4. **SAME—*Application to be to a Court of Equity.***—The doctrine of subrogation, taken from the civil law, has been enlarged and extended until it has come to be one in which the question is, almost always, what are the equitable rights of the parties? That is to say, the application is to a court of equity to do that which, in accordance with the law, is equitable. The law of subrogation has been sometimes said to rest on the basis of mere equity and benevolence.

5. **VOLUNTEER—*Who is not.***—One who, at the request of the debtor, advances money to discharge an incumbrance, is not a mere volunteer.

Foreclosure, of a trust deed. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

WINSTON & MEAGHER, attorneys for appellants; JAMES F. MEAGHER and SILAS H. STRAWN, of counsel.

JAMES E. MUNBOE, attorney for appellee.

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MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was a bill filed by appellee to foreclose a trust deed dated October 24, 1892, securing \$25,000 loaned by her to one William K. Lowrey.

The loan was payable five years after date, with interest at the rate of 6 per cent per annum, payable semi-annually.

The trust deed conveyed to Horace A. Hurlbut, as trustee, lots 1, 2, 3, 4, 5, 6 and 7, in W. K. Lowrey's resubdivision of lots 16, 17 and 18, with a part of lot 15, in the county clerk's second division of lots 1, 2 and 4 to 14 inclusive (except street), in block 56 in the Canal Trustees' subdivision of section 7, township 39, 14, 3.

The bill charged that the loan was made and obtained for the purpose of paying off and discharging seven trust deeds, dated June 30, 1892, made by said Lowrey to one William J. Goudy, as trustee, conveying, respectively, said lots 1, 2, 3, 4, 5, 6 and 7, to secure, respectively, sums ranging severally between \$3,275 and \$4,200, each due five years after date, with interest at 6 per cent per annum, payable semi-annually; said trust deeds having been recorded July 21, 1892; that on July 1, 1892, Lowrey executed to C. K. G. Billings, as trustee, a deed of trust of that date, which was recorded August 19, 1892, and conveyed to said Billings Lowrey's equity of redemption in said lots 1, 2 and 3, being subject to the three deeds of trust dated June 30, 1892, made by Lowrey to Goudy; that the deed of trust to Billings was made to secure a promissory note of Lowrey's for \$5,250, payable to the order of the Home Savings Bank of Chicago.

To so much of the bill appellants answered, denying the allegations. To the following portions of the bill appellants demurred:

The bill further charged that at the time of the execution and recording of the trust deed made by Lowrey to Billings, both Billings and the Home Savings Bank knew of the three deeds of trust to Goudy upon said lots 1, 2, and 3, and took the deed made to Billings subject to the deeds of trust made to Goudy; that on the 2d day

of November, 1892, in accordance with the purpose of the loan made by appellee to Lowrey, she paid to the holders of the indebtedness secured by the seven trust deeds to Goudy, the amount thereof, being the sum of \$25,000, and on the 2d day of November, 1892, she obtained from Goudy a release of all of said trust deeds made to him as aforesaid, and on the same day caused the same to be recorded; that when she did this neither she nor any one acting in her behalf, had any notice of the existence of said trust deed made by Lowrey to Billings, and that she made her said loan to Lowrey and obtained and recorded releases of said seven deeds of trust to Goudy in the full belief that the deed of trust made by Lowrey to Hurlbut for her benefit would be a first lien upon the premises thereby conveyed, as soon as the deeds of trust to Goudy should be released of record; that before she paid out any money on the said loan by her made, she obtained an abstract of title to the premises conveyed to Hurlbut as aforesaid for her security, brought down to cover the recording of the said deed of trust to Hurlbut; but said abstract did not contain any reference to said deed of trust made by Lowrey to Billings, and she, complainant, was not advised of the existence thereof until June, 1895; that the Home Savings Bank has not parted with anything on the faith of the release of said deeds of trust to Goudy, covering said lots 1, 2 and 3, or changed its position, or done anything upon the faith of the release of said three trust deeds to Goudy, or any of them, and that complainant, under the circumstances, has an equity entitling her to be subrogated to the lien of said three trust deeds to Goudy covering said lots 1, 2 and 3.

The bill further alleged (to which an answer was made,) that the property conveyed by the said trust deed to Hurlbut was not of sufficient value to pay the indebtedness to her, the complainant, and the indebtedness secured by the trust deed made to Billings.

The cause having been referred to a master, he made a report finding substantially that the foregoing allegations of the bill were sustained, and a decree was entered con-

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firming the master's report, and subrogating the complainant to the lien of said three trust deeds to Goudy on said lots 1, 2 and 3.

Subrogation is the substitution of another in the place of a claimant to whose rights such other succeeds in relation to a claim which has been paid by him, as a matter of right or privilege, and not as a mere voluntary act.

The principal contention in this case is as to whether appellee, in paying off and discharging the lien of the trust deeds to Goudy, was a mere volunteer.

The general rule is, that any person having an interest in property upon which there is an incumbrance, may, if necessary for his own protection, pay off the same and be substituted to the rights and remedies of the holder of such lien. 24 Am. & Eng. Ency. of Law, 248.

In the present case, it appears that the trust deed made for complainant's benefit had been placed upon record prior to the discharge by her of the lien of the Goudy trust deeds.

The complainant had undertaken to make a loan of \$25,000 to Lowrey, and upon his part Lowrey had executed, and there had been recorded, in the carrying out of the agreement made by him with her, a trust deed covering said lots 1, 2 and 3.

While it is true that at such time the trust deed to Hurlbut, made for complainant's benefit, was largely but a mere legal claim upon the premises, no money yet having been advanced, nevertheless, under the complainant's agreement to make a loan, and her right to have the security promised therefor, there existed an equitable right to have the agreement for the loan carried out by both parties thereto.

The general rule is, that one who, at the request of the debtor, advances money to discharge an incumbrance, is not a mere volunteer. That, in the present case, the understanding and agreement between Lowrey and the complainant was that she should, for her security, have a valid and first lien upon all the property conveyed to Hurlbut, is clear. The complainant therefore seems to be within the rule that her payment was not that of a mere volunteer, but was made at the request of the debtor owing the debt for which

the incumbrance discharged by her existed, and with an understanding with such debtor to whom her loan was made, that she should have a first lien upon the premises covered by the discharged incumbrance, and that the satisfaction of such incumbrance was made at a time when the complainant had a claim of record upon said premises, and was under an obligation to advance money and discharge the incumbrance upon said lots 1, 2 and 3.

The doctrine of subrogation, taken from the civil law, has been enlarged and extended until it has come to be one in which the question is almost always, what are the equitable rights of the parties? That is to say, the application is to a court of equity to do that which, in accordance with the law, is equitable. The law of subrogation has been sometimes said to rest on the basis of mere equity and benevolence. *Cheeseboro v. Millard*, 1 Johns. Ch. (N. Y.) 409; *Gans v. Thieme et al.*, 93 N. Y. 225.

The formal discharge of the mortgage by the creditor will not prevent the subrogation of one who advances money to pay off the mortgage with the agreement that it should be assigned to him for his security, but this rule will not be enforced to the impairment of the legal or equitable rights of others acquired in ignorance of the agreement and relying upon the extinguishment as shown by the record. 24 Am. & Eng. Ency. of Law, 296.

In the present case, the agreement between Lowrey and appellee was, not that the mortgage which she discharged should be assigned to her for security, but it was, in effect equitably the same thing—it being that she should have a first lien upon the premises covered by the mortgage in question, which necessarily involved either the assignment of such mortgage or its discharge, thus making the trust deed to Hurlbut for her benefit a first lien upon said premises.

Appellants have not, nor has either of them, paid or done anything upon the faith of the discharge of the trust deeds to Goudy. What appellants are contending for is a pure legal advantage, obtained without consideration. If appellants succeed, they will have obtained the benefit of a pay-

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ment of more than \$10,000 by appellee, without, upon their part, having done or suffered anything. In effect, appellants are insisting that a pure gift, for the benefit of the Home Savings Bank, has been made by appellee.

The equities of the case are clearly with appellee, and there is no rule of law that prevents a court of equity doing, in this matter, what is equitable and just, namely, that appellee be subrogated to the lien and charge of the incumbrance upon said lots, 1, 2 and 3, as such charge existed upon the date when, with her money, the indebtedness of William K. Lowrey secured thereby was paid.

One who advances money to pay off an incumbrance upon the agreement with the debtor that the security shall be assigned to him, or a new one upon the same premises or property given to him, will be subrogated to the rights of the incumbrancer, and if the new security turns out to be defective, he will be substituted to the benefit of the prior incumbrance unless the superior or equal equities of others would be prejudiced thereby. 24 Am. & Eng. Ency. of Law, 292-294; Tyrell v. Ward, 102 Ill. 29; Harris on Subrogation, Sec. 792; Jones on Mortgages, 5th Ed., Sec. 874; Emmert v. Thompson, 49 Minn. 386; Union Mortgage and Banking Co. v. Peters, 72 Miss. 1058; Draper v. Ashley, 104 Mich. 527; Wilton v. Maybery, 75 Wis. 191.

The decree of the Circuit Court is therefore affirmed.

J. H. Friend v. Matthew Johnson.

1. **CHATTEL MORTGAGES**—*To Secure Installments of Rent Maturing in the Future.*—A chattel mortgage given to secure monthly installments of rent to become due in the future, evidenced by a series of promissory notes covering a period of two years, according to the terms of the lease, is valid.

2. **SAME**—*Diligence to Obtain Possession of Mortgaged Property.*—The mortgagee in a chattel mortgage to secure the payment of rent, upon the property of a firm in the hands of a receiver, who is prevented from obtaining such rent by distraint or otherwise, by the court in which the receivership was pending, can not be charged with a

want of diligence in taking possession of the property under the mortgage.

8. *SAME—To Secure Debts Becoming Due by Installments.*—Where the indebtedness secured by a chattel mortgage becomes due by installments, and the mortgage authorizes the mortgagee to take possession of the property on default of the payment of an installment, he may, but is not bound to do so.

Bill, for the dissolution of a partnership. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

HAWLEY & PROUTY, attorneys for appellant.

H. W. MAGEE, attorney for appellee; K. D. HARGER, attorney for assignee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree directing the payment out of the registry of the court of the sum of \$1,665, which it was found belonged to the appellee, or his assignee.

Such sum came into the registry of the court as part of the proceeds arising from the sale, by order of court, of certain chattels, consisting of hotel furniture that belonged to the firm of Lamberton & Dwight, a copartnership that had been engaged in carrying on a hotel in Chicago, and for a dissolution of which one of the partners had filed a bill against the other.

Johnson, the appellee, was the owner of the hotel, and leased the same to Lamberton & Dwight for a term of five years, beginning September 1, 1892, and ending August 31, 1897, at a gross rental of \$50,000, payable in monthly installments of \$833.33 each; and rent thereunder was paid by the lessees up to July 1, 1893, when for the first time they defaulted therein.

The bill to dissolve the partnership was filed September 18, 1893, and on the same day a receiver was appointed with authority to carry on the hotel business of the partnership until the further order of the court, and he continued in possession of the hotel and furniture until December 3, 1893.

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Failing to do a profitable business, the receiver was authorized by the court, in November, 1893, to sell the furniture, and an offer of \$7,500 for the same was made by or in behalf of the appellant, and was ordered to be accepted, but appellant refused to perform the offer, and a few days later a sale thereof to the appellee for the sum of \$4,500 was made and approved by the court, and \$2,400 of said \$4,500 was allowed to be retained by appellee to apply on his account for rent of the premises.

The money, ordered to be paid by the decree that is appealed from, represents the balance of said \$4,500, after deducting certain expenses, etc.

The appellant was a creditor of the partnership, and held a chattel mortgage covering the furniture. Such mortgage was dated May 8, 1893, and was for \$10,500, payable one year after that date.

The firm had also given their chattel mortgage to appellee in November, 1892, covering the furniture in question, to secure "the sum of \$20,000, being two years rent in monthly installments of \$833.33 each on the first day of each and every month from September 1, 1892, according to the covenants and terms" of the lease and a previous agreement for the lease.

The contest now is which, appellant or appellee, is entitled to the said balance of \$1,665.

The mortgages were both recorded about the dates of their execution, and, apparently, both appellant and appellee had actual notice of the other's mortgage.

The master found and reported in favor the appellee, and the decree confirmed such report.

The chief burden of appellant's argument is that the mortgage to appellee was to secure future optional advances.

We do not understand appellant to seriously contend that the subsequently accruing rent of fixed monthly installments of \$833.33 each, would, if standing by itself, be in the nature of "optional advances;" but, if such be his contention, we can not concede to it any especial force.

The rent that was due for each month of the two years which the mortgage covered was as certain as it could have been made by the terms of a series of promissory notes. The fact that appellee might have terminated the lease under the terms of its covenants, did not make rent which accrued after such right existed an optional advance. As well might it be said that if default in the payment of one of a series of promissory notes was a ground for declaring all subsequently maturing ones due and payable, a failure to exercise such a power made all subsequently maturing notes optional advances. The landlord, appellee, might have terminated the lease, but he was not bound to do so. And neither was he bound to take possession of the mortgaged property upon the maturing of a part of the rent. *Barbour v. White*, 37 Ill. 164; *Cleaves v. Herbert*, 61 Ill. 126; *McConnell v. Scott*, 67 Ill. 274.

But we understand that appellant insists that because, by the defeasance clause of the mortgage already quoted from, other moneys might perhaps become due to appellee under some of the "covenants and terms" of the lease and agreement referred to, therefore such moneys are in the nature of future optional advances, and the whole mortgage is vitiated thereby.

We do not think so. It was the monthly installments of \$833.33 that should mature "according to the covenants and terms" of the lease and agreement that the mortgage secured, and nothing else. The mortgage itself does not appear in the abstract, but from what is there found we can discover no other fair conclusion that can be drawn of its purport.

Another point, argued elaborately by appellant, is, that the mortgage to appellee is void as to appellant, because given to secure rent which would not mature within two years, and, therefore, in contravention of the statutes of Illinois relating to liens of chattel mortgages.

A reading of what we have quoted above, concerning what rent the mortgage was given to secure, is a sufficient answer to the proposition. We can not undertake to answer

Heffron v. Osborne.

every objection that has been urged by the appellant, further than to say that none of them seem to be entitled to the weight they are argued as possessing.

The appellee seems to have exercised constant diligence, from the time he filed his first petition, five days after the receiver was appointed, to the time when the appealed from order was made, to obtain his rent by distraint or otherwise, but was not allowed by the court in which the receivership was pending to do anything towards that end, and it was at last only by buying the furniture himself that he was able to obtain any relief in the matter.

The decree appealed from was right, and it is affirmed.

Patrick H. Heffron, John M. H. Burgett v. Frank S. Osborne and Louise N. Osborne.

1. **APPELLATE COURT PRACTICE—In Affirming Decrees.**—The Appellate Court, in affirming a decree, will not collate and recapitulate in its opinion the evidence contained in the record merely to demonstrate that the determination by the court below of a question of fact is right.

Bill for Relief.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

GRAHAM H. HARRIS, attorney for Patrick H. Heffron, appellant.

S. P. SHOPE, attorney for John M. H. Burgett, appellant.

ROBERT F. PERTIBONE, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Between Heffron, and Gore and Heffron, and several others, the property which is the subject of contention here, with its incidents, has engaged a considerable portion of the time and attention of this court for several years.

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Lots 15 and 16 were sold under a foreclosure decree, binding on all the parties in this suit, for an amount which required, April 17, 1895, \$161,431.95 to satisfy, and that sum was raised from the resources of the appellee Louise, wife of the appellee Frank, and the title to the property taken in his name as trustee for her.

The question in this case—which the court below decided in the negative—is whether there was any other trust, or any arrangement which a court of equity would construe, or from which it would raise, some sort of trust in favor of somebody else upon the happening of some event. One appellant assigns sixteen and the other seventeen errors on this negative decree; and the appellees assign seven cross-errors, but the lapse of time will cure them before this opinion will be filed.

Duty does not require that we collate and recapitulate in this opinion the evidence contained in this record of hundreds of pages, merely to demonstrate that the determination by the Superior Court of a question of fact is right.

The decree is affirmed.

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Farmers Loan and Trust Co. v. The Lake Street Elevated R. R. Co., The American Trust and Savings Bank and The Northern Trust Co.

1. **SUPERIOR COURT—*Jurisdiction of Removal of Causes.***—The Superior Court of Cook County has jurisdiction to determine as to whether, upon the presentation made to it, an order of removal, under the United States Removal Act, should be made transferring the cause to the Federal Court.

2. **REMOVAL OF CAUSES—*Question of, How Determined.***—On an application for the removal of a cause from a State to a Federal court, the question as to whether the petitioner is entitled to have the cause removed is to be determined by an inspection of the record in the State court.

3. **SAME—*Failure of Petitioner to File a Bond.***—A State court may properly refuse to allow the prayer of the petition for the removal of a cause to the Federal court where the petitioner fails to make and file with his petition a bond, with good and sufficient sureties, as required by the Federal statute.

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4. **FOREIGN CORPORATIONS—Power to Accept and Execute Trusts, etc.**—A foreign corporation needs no statutory permission to do in this State what it may lawfully do at home. By general comity, in the absence of positive directions to the contrary, corporations created in one State or Territory, are permitted to carry on any lawful business in any other State or Territory, and to acquire, hold and transfer property there, the same as domestic corporations may do.

5. **SAME—Rights and Liabilities.**—Foreign corporations, and the officers and agents thereof, doing business in this State are placed on an equality with corporations of like character organized under the general laws of this State, to the extent that they shall exercise no greater or different powers, and shall be subject to the same regulations and restrictions, and governed by the same laws in these respects.

6. **SAME—Acting as Trustee in this State.**—A foreign corporation accepting and acting as a trustee under a deed vesting it with power and discretion, among other things, in a certain contingency, to enter into and take possession of all property conveyed by such deed, and hold and operate the same by such agent and managers as it may appoint; collect and receive all moneys and revenues arising from such management, and apply the same to its expenses in the performance of the trust, including a reasonable compensation for its services, etc.; next, to the maintenance and operation of the property including the payment of taxes, assessments and other charges, damages, etc.; and next, to the payment *pro rata* of the interest due and in default of certain bonds, comes within the purview of section nine of the act "to provide for and regulate the administration of trusts by trust companies" (approved June 15, 1887); and such corporation can not act under such act in this State without first complying with its provisions.

7. **PARTIES—Who are Necessary in Equity.**—In a suit in equity, to remove a trustee where the *cestuis que trust* are numerous, it is not necessary that all of them should be made parties to the suit.

8. **SAME—By Representation.**—Where it appears that a particular party, though not before the court in person, is so far represented by others that his interests receive actual and efficient protection, the decree may be held to be binding upon him.

9. **FREEHOLD AND FRANCHISE—When Not Involved.**—In a proceeding in equity, to remove a trustee appointed in a deed of trust of real and personal property, neither a freehold nor a franchise is involved.

Bill, to remove a trustee. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1886. Affirmed. Opinion filed February 9, 1897.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Superior Court of Cook County, removing appellant as trustee under a mort-

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gage made by appellee The Lake Street Elevated Railroad Company, to appellant The Farmers Loan and Trust Company and The American Trust and Savings Bank, as trustees; and enjoining appellant from taking any steps to foreclose or otherwise act as trustee under the mortgage.

The bill was filed by appellee The Lake Street Elevated Railroad Company, on the 30th day of January, 1896, and made appellant The Farmers Loan and Trust Company, The American Trust and Saving Bank and The Northern Trust Company defendants.

The bill alleged that on the 7th day of April, 1893, the complainant, The Lake Street Elevated Railroad Company, made a mortgage to the defendant The American Trust and Savings Bank, and the defendant The Farmers Loan and Trust Company, as trustees; that the trust was accepted in writing by the trustees, and that the mortgage was duly recorded on May 6, 1893.

RUNNELLS & BURRY and HERRICK, ALLEN, BOYESEN & MARTIN, attorneys for appellant.

KNIGHT & BROWN, attorneys for appellee The Lake Street Elevated R. R. Co.

MORAN, KRAUS & MAYER, attorneys for appellee The American Trust and Savings Bank.

DUPEE, JUDAH, WILLARD & WOLF, attorneys for appellee The Northern Trust Co.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In the body of the bill the complainant declared that it made the above named defendants and all other holders of bonds issued by the Lake Street Elevated Railroad Company under such mortgage, and all the trustees, parties defendant to its bill of complaint; but it asked for process against only the three defendants above named, and none other were brought into or appeared in the cause.

Appellant filed its petition, asking that said cause be transferred to the United States Circuit Court for the Northern District of Illinois. This petition the court denied, and this is said to have been error.

Upon the denial of such petition, appellant applied to said United States court, asking that it direct the transfer of said cause into its forum. The United States court, upon full consideration of the matter, decided that appellant was entitled to have the cause transferred, and took jurisdiction. From such action on the part of the United States Circuit Court an appeal was taken by the complainant in said bill, to the United States Appellate Court for this judicial circuit. That court declined to pass upon the question involved in the appeal, holding that if the action of the United States Circuit Court in directing a transfer was improper, its order in that regard was a nullity, having no effect upon the Superior Court of this county, in which the suit was brought, and that the action of the United States Circuit Court was one which it could at any time rescind in case it, at any time during the progress of the cause, came to the conclusion that in taking jurisdiction as it did, it acted erroneously.

That the Superior Court of this county had jurisdiction to determine as to whether, upon the presentation made to it, an order of removal should be made, is beyond question. *Stone v. Sargeant*, 129 Mass. 503; *Broadway Nat'l Bank v. Adams*, 130 Mass. 431; *Amy v. Manning*, 144 Mass. 153; *Burlington Ry. Co. v. Dunn*, 122 U. S. 513; *Mo. Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556.

The question presented to the Superior Court as to whether the petitioner was entitled to have the cause removed to the United States Circuit Court was to be determined by an inspection of the record in the Superior Court. *Crehore v. Ohio & Mississippi Ry. Co.*, 131 U. S. 240; *Beadleston v. Harpending*, 32 Fed. Rep. 644.

The Superior Court refused to allow the prayer of the petition for removal, because, among other reasons, the petitioner had not presented such a bond as is required by statute.

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It is true that, under the United States removal statute, the sufficiency of the bond is not a matter of substance affecting the jurisdiction, and that therefore objections to it may be waived, and may in some instances be cured by amendment. *Ayres v. Watson*, 113 U. S. 594; *Coburn et al. v. Cedar Valley Land & Cattle Co.*, 25 Fed. Rep. 791.

If the Superior Court had transferred this cause to the United States Circuit Court it may be that the petitioner would there have been allowed to file a good and sufficient bond, conformable to the statute; but the question presented to the Superior Court was whether, upon the record presented to it, a removal should be made; and it does not appear that the petitioner asked leave to file any new or additional bond, although it did offer to show that the obligors were amply sufficient for the undertaking they had entered into.

The statute under which such removal was sought is that "any party entitled to removal may make and file a petition in such suit, in such State court, * * * and shall make and file therewith a bond, with good and sufficient surety."

In the present case, the petitioner, the Farmers Loan and Trust Company, did not make and file with its petition any bond at all. The bond filed was that of William Burry and Rockwell King, of Chicago. Clearly, a bond made by those parties was not such an one as the statute makes a pre-requisite to the right of removal.

The Supreme Court of this State, in *Weed Sewing Machine Co. v. Smith*, 71 Ill. 204, held that to entitle a party to, under the United States statute, transfer a cause from the State to the United States Court, it was the duty of the petitioner to present a bond signed by itself, with sureties proven to the court to be sufficient. That rule was followed in *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Monahan*, 140 Ill. 474.

The Superior Court, therefore, properly refused to transfer the cause to the United States Court, and its jurisdiction was not affected by the action of the United States Circuit Court before mentioned. True it is, that as to the right of

removal the decision of the Supreme Court of the United States is final, but the Superior Court is not bound by the action of the United States Circuit Court, and that court is not concluded by what was done in the Superior Court; while, as to the right of removal, the action of each of those courts is finally reviewable by the Supreme Court of the United States. The Superior Court, retaining jurisdiction, went on to determine the issues presented by the pleadings before it, and rendered a decree removing appellant as trustee under the said mortgage. The bill filed in the Superior Court alleged that appellant was, at the time the mortgage was executed and delivered, May, 1893, a corporation of the State of New York, and had not, prior thereto nor since, complied with the laws of the State of Illinois requiring the deposit with the auditor of public accounts of the sum of \$200,000 in securities for the benefit of its creditors, as was alleged it was bound, under the laws of this State, to do before entering upon the performance of its duties as such trustee.

The law of this State referred to is, in part, as follows:

“That any corporation which has been or shall be incorporated under the general incorporation laws of this State, being an act entitled ‘An act concerning corporations,’ and all amendments thereof, for the purpose of accepting and executing trusts, and any corporations now or hereafter authorized by law to accept and execute trusts, may be appointed assignee or trustee by deed, and executor or trustee by will, and such appointment shall be of like force as in the case of appointment of a natural person.”

The statute also, in the enumeration of the duties of corporations accepting and executing trusts, provides that such companies shall file with the State auditor, during the month of January of each year, a list and brief description of the trusts held by such company, the source of the appointment thereto, and the amount of real and personal estate held by such company by virtue thereof, except that mere mortgage trusts, wherein no action has been taken by such company, shall not be included in such statement.

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It is conceded that appellant has not attempted to comply with the provisions of this statute, it being urged in its behalf, that the trust which it accepted, and under which it has acted as trustee of the Lake Street Elevated Railroad Company, is not such an one as is within the purview of the statute in question.

It is the case, as is contended by appellant, that a foreign corporation, authorized by the State of its domicile to accept and execute trusts, needs no statutory permission to do in foreign States what it may lawfully do at home. By virtue of general comity, which, in the absence of positive directions to the contrary, prevails throughout the United States, corporations created in one State or Territory are permitted to carry on any lawful business in any other State or Territory, and to acquire, hold and transfer property there, as may domestic corporations. *Stevens v. Pratt*, 101 Ill. 225.

Nor does it necessarily follow that a prohibition against the exercise of certain functions by domestic corporations necessarily amounts to a similar prohibition against foreign corporations; but the 26th section of the general act concerning corporations, makes foreign corporations, the officers and agents thereof, doing business in this State, subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this State; and further provides that foreign corporations shall have, in this State, no other or greater powers than domestic corporations.

This section has been passed upon in the case of *Pennsylvania Co. v. Bauerele*, 143 Ill. 459. In that case the court declared that by this act foreign corporations and the officers and agents thereof, doing business in this State, are placed on an equality with corporations of like character organized or to be organized under the general laws of this State, to the extent that they shall exercise no greater or different powers, and shall be subject to the same regulations and restrictions, and governed by the same rules of law in these respects.

It is insisted by appellant that it, by virtue of the trust deed, occupies merely the position of a mortgagee, and that in this State the rule is well settled that the mortgagor, notwithstanding the terms of an instrument which is called but a mortgage, is considered the real owner of the property, and that therefore the trust deed, which appellant styles "a mere mortgage," was not within the prohibition of the statute.

If the instrument under consideration were a mere mortgage, that is to say, a mere transfer of title or vesting of a lien as security, imposing upon appellant no active duties giving it the right, perhaps, upon default, to file a bill, but not making it imperative that it should do so in any case, a very different question would be presented.

An examination of the trust deed reveals that there has been imposed upon appellant, and that it has engaged in the execution of, a trust of a very active nature; that it is no mere naked trustee, but is clothed with great authority, endowed with discretion to act, and that in pursuance of the authority conferred upon it, it has been continually doing business in this State and receiving compensation therefor. It began by accepting the trust, which was for the purpose of securing an issue of bonds, now amounting to \$7,574,000; in pursuance of the trust conferred upon it, it has had examined vouchers showing the progress of work upon the Lake Street Elevated Railroad, and has certified and delivered bonds upon such vouchers to the amount of \$3,000,000, receiving therefor one dollar for each bond so certified.

As before stated, appellant and the American Trust and Savings Bank were co-trustees. The trust deed, among other things, contains the following:

"To further assure this provision, the said trustees, if they deem proper to do so, may appoint an agent of known integrity and business capacity, with full power to dismiss him and appoint another in his stead at pleasure, who shall have the right to attend all meetings of the board of directors, have free access to, and from time to time examine all

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books of account of the party of the first part appertaining to the application and expenditure of said proceeds of the sale of all said bonds issued in excess of said six thousand five hundred (6,500) bonds, and shall make full report thereof to the trustees every three months, and as much oftener as they may from time to time require, for the information of the bondholders under this mortgage; and the railroad company shall pay said agent a reasonable compensation for his services, during the time of the construction of said railroad, for which additional bonds are desired as aforesaid, not to exceed, however, one thousand dollars (\$1,000) per annum."

Altogether, these trustees have certified and delivered 7,574 bonds in the course of this business. Many questions have arisen, which appellant has been obliged to, and has, considered, and much discretion has been by it exercised. It has found it necessary to, and has, appointed an agent to act for it in the State of Illinois, and has paid him compensation therefor.

It, with its co-trustee, is also vested with much power and discretion which it has not yet exercised. The trust deed is in part as follows: That in a certain contingency the trustees "shall enter into and take full possession of said railroad, and of all property hereby mortgaged or expressed, or intended so to be, and hold, use, manage, maintain and operate said railroad by such agent and managers as such trustees may appoint," and that they shall "collect and receive all moneys and revenues arising from such management and apply the same to the expenses of the trustees in the performance of the trust, including a reasonable compensation for their own services, the services of their counsel, attorneys, agents and other servants, and next to the maintenance, management and operation of the said railroad and of the property belonging thereto, hereby mortgaged, including the payment of taxes, assessments and other governmental charges, damages and such useful additions, alterations or repairs to the mortgaged property or any of it, as the trustees may think proper to be made; and

next, to the payment *pro rata* of the interest due and in default of said bonds.”

We entertain no doubt that the trust accepted by appellant is within the terms of the statute of this State, and that it can not act thereunder without first complying with the law of this State.

It is urged by appellant that complainant’s bill being for the removal of a trustee, it was necessary that all the *cestuis que trust* are necessary parties to the suit.

This we consider a question of more doubt than any other presented in the case. The general rule undoubtedly is, that all the *cestuis que trust* are necessary parties to a bill to remove a trustee. 1 Perry on Trusts, Sec. 282; 2 Perry on Trusts, Sec. 875; Hill on Trustees, star paging, 195; Bear v. Amer. Telegraph Co., 36 Hun, 400.

In considering this question, it is necessary to keep clearly in mind the distinction between proper and necessary parties, between those who have a right to, or may be, made parties, and those whom it is necessary should be brought in, in order that the decree entered may be valid; and it is to be borne in mind that when considering whether a decree is invalid for want of parties, it is not so much what was sought by the bill as what is given by the decree that is to be looked at; the question always being—were all persons necessary to the relief obtained brought in? Thus it may be, that considering the prayer of a bill, a chancellor should have required an amendment or dismissed the same for want of proper parties, and yet the decree rendered thereunder be valid, because to the relief obtained all necessary parties were brought in.

The rule stated in Calvert on Parties to Suits in Equity, page 7, is: “All persons having an interest in the object of the suit ought to be made parties.”

In Wych v. Meal, 3 P. W. 311, it is said: “It is a general rule that no one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree.”

If said doctrine were to be applied in this case, it is manifest there was no defect for want of parties, as the decree is only against the appellant.

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In *Cockburn v. Thompson*, 16 Vesey, 325, it is said: "The strict rule is, that all persons materially interested in the subject of the suit, however numerous, ought to be parties, that there may be a complete decree between all parties having material interests; but that, being the general rule established for the convenient administration of justice, must not be adhered to in cases to which, consistently with practical convenience, it is incapable of application. In the familiar case of creditors suing on behalf of themselves and all others, what an infinite number of valuable interests may be bound, in a sense, not absolutely; as, where the court, for convenience, dispenses with the presence of parties, the principal leaves it by future arrangement to find out the means of giving them an opportunity in some shape of coming in." So, too, Lord Thurlow, in the case of *Pearce v. Piper*, 17 Vesey, 1, in discussing the general rule requiring all parties having material interest to be brought in, said that the difficulties presented by such rule were overcome upon this principle, and that it was better to go as far as possible toward justice than to deny it altogether.

In *Perry on Trusts*, Sec. 885, it is said: "Where the parties in interest are so numerous that it is not possible or convenient to join all as plaintiffs, the court will allow a few *cestuis que trust* to sue in behalf of themselves and the others, so a small number may be made defendants as representatives of all the others, for the purpose of determining their rights, but in such cases all the trustees must be joined. If all the *cestuis que trust* must join in a conveyance, they should all join in the suit, otherwise the litigation might be futile; but in the absence of any, the court will proceed to bind the rights of all, if possible, in order that a few may sue or be sued in behalf of a large number; it must appear that all have the same beneficial interests, or, if they have different or conflicting interests, they must all be brought before the court, in order that their separate interests may be adjusted."

It seems to be established in England that the rule requiring all parties in interest to be brought in is one that yields

to considerations of convenience and practicability, and that where the parties in interest are numerous, or where it is impracticable to bring in all parties who have interests, a few may be made parties as representing all, the court being satisfied, and if necessary, seeing to it that the litigation is so conducted and the contest so made that the interests of all are protected, and that neither by collusion or inattention is there a failure to protect the rights of all persons who are affected by the decree; as see, to this effect, *Adair v. The New River Co.*, 11 Vesey, 429; *The Attorney-General v. Jackson*, 11 Vesey, 365.

In the last named case, Lord Eldon said: "It is true, upon a bill for equitable relief as to a rent charge, with some few exceptions, all the persons whose estates are liable must be brought before the court, that complete justice may be done, and the question tried in the presence of all who are interested; also, with reference to contribution among them. I say with few exceptions, for some cases are to be found under circumstances making the rule impracticable or inconvenient in a degree almost arising to that, and those circumstances have induced the court to dispense with that rule."

In *Meux v. Maltby*, 2 Swanston's Reports, 277, the court, after reviewing the authorities, said: "The rule that all persons interested must be parties yields when justice requires it in the instance either of plaintiffs or defendants. The rigid enforcement of the rule would lead to perpetual difficulty."

There is a current of authority adopting, more or less, a general principle of exception to such rule. To the same effect is *City of London v. Richmond*, 2 Vernon's Rpts. 421.

In *Harvey v. Harvey*, 4 Beavan, 215, objection was made that the suit was imperfect for want of parties. The Master of the Rolls said: "Questions of this nature—whether certain persons so circumstanced are or are not independent parties to a suit—are very much questions of convenience, and in this case I am of opinion that, though some incon-

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venience may arise in not having all the parties presumptively entitled before the court, that such inconvenience would be considerably less than would necessarily arise from requiring them to be made parties in this stage of the cause, and which would probably amount to a complete obstruction of the suit, and would render it impossible ever to bring it to a hearing." No other objection for the want of parties being made, the cause was referred to a master for further inquiry as to who were the next of kin and who the legal personal representatives of such next of kin as were dead. In 5 Beavan, page 134, it appeared that the master reported that such next of kin were twenty in number, of whom twelve were now living, and that of the remaining eight there were personal representatives of three only, and that the others were not represented; so that on the whole, five-ninths of the next of kin were represented in the suit. Upon this record the court determined that it would hear the cause in the absence of the other next of kin.

In *Bunnett v. Foster*, 7 Beavan, 540, the Master of the Rolls said, that the practice of allowing some members of the class to represent the whole in certain cases had been adopted on grounds of convenience, but in this respect every case must be governed by its own circumstances.

In one case where the *cestuis que trust* were twenty-six in number, and in another twenty-seven, a few were allowed to maintain bills in behalf of the whole for the execution of the trust.

In *Hale et al. v. Hale et al.*, 146 Ill. 227, it is said :

"It is unquestionably a general rule, subject, however, to certain well recognized exceptions, that in proceedings in equity, the interests of parties not before the court will not be bound by the decree. But among the exceptions is one growing out of convenience or necessity in the administration of justice, which has given rise to what is known as the doctrine of representation. Thus, where it appears that a particular party, though not before the court in person, is so far represented by others that his interests receive actual

and efficient protection, the decree may be held to be binding upon him.

A familiar illustration may be found in cases where the parties are so numerous that it is inconvenient or impossible to bring them all before the court, and it appears that they all stand in the same situation, and have one common right or have one common interest, the operation and protection of which will be for the common benefit of all, and can not be to the injury of any. Under such circumstances, the bill is permitted to be filed by a few, on behalf of themselves and all others, or against a few, and yet bind the rights and interests of all others. Story's Eq. Plead., Sec. 126."

We are not now dealing with the question presented in *Toler v. East Tenn. V. & G. Ry. Co.*, 67 Fed. Rep. 168, in which a *cestui que trust* came into court and asked leave to intervene, but with a case in which no attempt has been made to get in, or have brought in, any person not a party to the litigation. This is not a case in which, as regards the relief obtained, the *cestuis que trust* have conflicting interests. Each and all of the bondholders are interested in having trustees entitled, under the laws of this State, to act in accordance with the terms of the trust deed. The duties and obligations of the trustees are the same toward each and every bondholder. As is well said in *Toler v. E. Tenn. V. & G. Ry. Co.*, 67 Fed. Rep. 168: "In this case, whether the trustee be a complainant or a defendant, he stands for and represents all the beneficiaries who, though not actually parties, will be concluded by the decree, unless it is impeached for fraud or collusion between him and the adverse parties."

That the duty of the trustees, under this instrument, be they those originally designated or those who may hereafter be selected, is to protect and act equally for each and every bondholder, is a truism which, to a lawyer, it is unnecessary to mention. It is quite true that, in the exercise of discretion conferred upon trustees, differences of opinion may arise, conduct favored by certain trustees being opposed by others, but whatever be the discretion

finally exercised, the course ultimately pursued is to be determined upon and followed with a view to the equal protection of all the *cestius que trust*, whether the *cestuis que trust*, or any portion thereof, favor or oppose the action taken.

Appellant, as a trustee, having been removed by the decree of the court below, not because of any dereliction of duty, but for the reason only that under the laws of this State it is not entitled to act as such trustee, the removal is not one which injuriously affects the interests of anybody. Appellant, if it has been acting in violation of the laws of this State, certainly desires to cease so doing; and each and every bondholder, if appellant is not entitled to act as a trustee in this matter, has no desire that it should continue so to do.

The question presented is one of law only, and one in which all parties are interested to have such action taken as is in accordance with the law of this State.

We agree with counsel for appellant in their contention that it was no more necessary that The Northern Trust Company be made a party to this litigation than that any other bondholder be made a party. There was, nevertheless, a manifest propriety in selecting The Northern Trust Company as a representative of the bondholders, it holding 6,592 of the bonds issued by The Lake Street Elevated Railroad Company, and thus representing more than six-sevenths of the indebtedness secured by the trust deed.

The powers and duties of the trustees under this mortgage were great. The Lake Street Elevated Railroad Company was itself a *cestui que trust*, and, as such, properly filed the bill in this case. It was, perhaps, necessary that only one of the *cestuis que trust* should be a party to this litigation, and that each of the trustees should be brought in. To have brought in all of the *cestuis que trust* and conducted this litigation with all the necessary changes occurring from time to time, by death and otherwise, in the ownership of these bonds, would have protracted these proceedings indefinitely. In so important a matter as is this, involving

interests so varied and extensive, the interests of each bondholder required that action should be prompt. That the trustees are not bound to act in accordance with the wishes of the majority of the bondholders, has already been stated; that they ought not to do so, if such action will be unfair or unjust to a minority, however small it may be, it is unnecessary to state.

If the record presented any reason for thinking that this litigation had been collusively conducted, with a view to preventing a fair or vigorous presentation of the rights of any bondholder, or if it appeared that the decree in any way or wise injuriously affected any *cestui que trust*, we should regard this matter differently. On the contrary, it is manifest that a most vigorous and earnest resistance to the relief sought by The Lake Street Elevated Railroad Company, and to the decree entered by the court, was made. Certain bondholders, not represented by The Northern Trust Company, and who appear to have been opposed to the action taken by the court below, testified in the cause. Able counsel were employed by appellant, and, so far as we can see, everything was done, every argument and suggestion made, to prevent the removal of appellant that could have been adduced had each and every *cestui que trust* been actually brought into the litigation.

The court having removed appellant, it was proper that an injunction against further action as such trustee by appellant should be entered.

We do not think that The Lake Street Elevated Railroad Company, or any other *cestui que trust* is estopped to ask for the removal of appellant and the appointment of a new trustee in its place. The Lake Street Elevated Railroad Company is not asking that the security by it given shall be in any way impaired, or that any act done by appellant under the trust deed shall be declared invalid. All that was asked, and all that has been done, is simply that under the trust deed there should be such trustees as, by the laws of the State of Illinois, are authorized to carry out the provisions of the trust.

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If The Lake Street Elevated Railroad Company, or any other *cestui que trust*, had sought, or was now seeking under this decree, to invalidate any acts that by virtue of the trust deed have been done by the trustees, a very different question would be presented, and the law of estoppel might have application.

The motion to dismiss this appeal is denied, because, in the opinion of this court, neither a franchise nor a freehold is involved in this proceeding; and also because the decree of the court below was final, and the certificate of evidence made is sufficient to enable this court to pass upon the questions presented to it.

The decree of the Superior Court is therefore affirmed.

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187 204

**John Novak and Mary Novak v. Vypomocny Spolek
Vlastenec Building and Loan
Association.**

1. **CONTRACTS—Under Seal—How Modified.**—The terms of a contract under seal can not be varied by another instrument not under seal, executed subsequently.

2. **BUILDING ASSOCIATIONS—Presumptions as to Authority of President and Secretary.**—A court will not presume that the president and secretary of a building association had authority to join in the execution of an instrument stating that a person who had made a note to the association was acting for a third party in so doing, and declaring such note to be the obligation of such party.

3. **SET-OFF—Of Matured Stock of a Building Association Against a Note to the Association.**—In a suit to foreclose a mortgage to a building association, it is proper to set off against the amount due under the mortgage any sum that may be due the defendant on matured stock in the association held by him.

4. **APPELLATE COURT PRACTICE—Abstracts Should Show Error Complaind of.**—This court will not hunt through the transcript to find facts to support or refute the assigned error. The facts necessary to support an assignment of error should appear in the abstract.

5. **SAME—Costs of Abstract Filed by Appellee.**—The cost of an additional abstract filed by an appellee will not be taxed against the appellant where the court does not find it necessary to refer to such additional abstract.

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6. **AMENDMENTS—Of Decrees.**—The description contained in a decree for foreclosure may be corrected, from matter appearing upon the record, after the filing of an appeal bond.

Foreclosure Proceedings.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

JONES & LUSK, attorneys for appellants.

CHARLES VESELY, attorney for appellees; A. N. TAGERT and W. F. COOLING, of counsel.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee Building and Loan Association filed its bill to foreclose a trust deed, given to it by the appellants, John Novak and his wife, to secure a loan of \$5,200, made to said John Novak, and obtained the decree of foreclosure and sale, which is appealed from.

In such suit the appellants filed their cross-bill, wherein they set up sundry matters which they alleged constituted good grounds against the liability of the appellant, John Novak, for any decree against him for any deficiency which might remain after a sale of the mortgaged premises, but such cross-bill was dismissed for want of equity, and the decree of sale that was entered found him to be liable for such deficiency, if any there should be.

The cross-bill also asked for an accounting by the appellee association with the appellant John Novak, concerning an alleged trust in connection with the mortgaged premises, and also concerning eight shares of stock in the appellee association, which were held by the said Novak and had matured.

The controversy upon this appeal is within narrow limits, and being in substance between only John Novak and the Building and Loan Association, we will, in speaking of them, call them appellant and appellee, respectively.

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In his reply brief, appellant says: "Appellant has not disputed the execution of the agreement and trust deed, nor that the loan which they represent was made. We deny the personal liability of John Novak, and we claim that the deficiency decree, as against him, is wrong. We admit that the foreclosure should proceed and that the sale should be made to satisfy the indebtedness represented by the agreement and trust deed, but we claim that if any deficiency decree is to be entered, it should be against the real debtor, Jan Sevcik, and that appellant John Novak should, at the same time, have a decree against appellee for the amount shown by the evidence to be due him from appellee."

Very briefly stated, the contention of the appellant made in his cross-bill was, that one Jan Sevcik being entitled, by agreement with his mortgagee, to an equity of redemption in the premises covered by the trust deed (the same having been sold and conveyed to the mortgagee by a master in chancery, under a decree of foreclosure against him at the suit of the Star Coal Company), applied to appellee for a loan sufficient to enable him to redeem or buy back the property, and, in expectation of obtaining such loan, bought fifty-two shares, of \$100 each, of the stock of appellee, and offered to mortgage the premises in question as security for the loan. But, for some reason not stated in the cross-bill, the appellee required, as a condition to making a loan upon the offered security, that Sevcik should consent to a conveyance of the premises by the Star Coal Company to the appellant, who was an officer of the appellee, to be held in trust by him for appellee as security for the applied-for loan, and should, also, transfer said fifty-two shares of stock to appellant for the same purpose, to the doing of which both Sevcik and the appellant consented, and which was done; and that it was, as a part of the same arrangement, also agreed by all the parties that appellant should give the trust deed and agreement to appellee for the loan, precisely as Sevcik would have done, had he held the title and made the papers. But that in fact it was to be treated as a loan to Sevcik, and that he was to remain in possession of the

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premises, pay and perform all the agreements which were on the face of the agreement to be paid and performed by the appellant, and that when Sevcik should have paid one-half of the indebtedness, the appellant should reconvey the premises to Sevcik.

And it was alleged that Sevcik did, for a time make the payments as required by the said agreement, but afterward defaulted, and thereupon the appellant collected as much of the rent of the premises as he could, and therewith made and kept up such payments, but never paid any part of such indebtedness, and was never expected to pay any, out of his own funds.

In support of appellant's contentions, so set up in his cross-bill, he set up what is called a "declaration of trust," as follows:

"Whereas, Jan Sevcik has made an application to Vlastenec Building and Loan Association for loan of fifty-two hundred dollars on his property which he owned in fee simple, being known as lot 45, in block ten (10), in Johnston & Lee's subdivision of section twenty (20), township thirty-nine (39) north, range fourteen (14) east of the third (3d) principal meridian, together with all the improvements thereon.

And, whereas, said property has been incumbered to the Star Coal Company, and said company has foreclosed the property, and the association through its board of directors intended to assist said Sevcik to redeem his property from the sale, therefore, it has been decided to make the loan to said Sevcik, provided he would pay to Vlastenec Build. & Loan Association thirteen dollars on each Thursday of every week, also interest at $6\frac{1}{2}$ per cent, in monthly installments, on \$5,200 until half of the sum, with interest thereon, is paid. And as further consideration, said Sevcik to assign and transfer his stock and quit-claim, with his wife, the above described property to John Novak as trustee; and when the amount as above said has been paid, then said John Novak, at the request of said Sevcik, with the consent of the board of directors of said association, shall reconvey

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the above said property to said Sevcik. In case of failure to make the weekly payments or interest, the said Sevcik shall surrender immediate possession, and the said John Novak is hereby authorized by the board of directors of said association and also by Jan Sevcik to take possession, collect all the rents and incomes, pay taxes and repairs and other expenses, and turn the balance to the association toward the payment of dues and interest.

The said John Novak shall further execute a trust deed and agreement and give the Sevciks' property as security for said loan of \$5,200.

Said Novak shall receive reasonable fees for his services if he collects the rents and perform any other duties as hereinbefore provided for.

In witness whereof we have subscribed our names and seals this second day of March, 1893.

JOSEPH SINDELAR, Pres.

JOSEPH PETRZELKA, Sec.

JAN SEVCIK and

JOHN NOVAK,

Trustees for Vlastenec Ass'n."

Although such "declaration of trust" bears the same date as that of the trust deed and agreement executed by appellant, it was established that it was not in fact made until afterward, and there is evidence tending to show that the officers of appellee, other than Novak, who signed it, understood from the appellant, at the time he requested them to sign it, that it was a paper needed by appellant to enable him to collect the rents of the mortgaged premises. The appellant was the "notary" of the appellee, which is said to mean that he was its legal adviser, and prepared the papers used in connection with loans.

We do not regard such "declaration of trust," though it be given full effect as written, as in any manner relieving the appellant from his agreement to pay the borrowed money, or from the effect of the trust deed made by him.

By such agreement and trust deed he obligated himself to pay the debt he had incurred through the loan that was

made to him, and we discover nothing in the "declaration of trust" that relieves him from such obligation.

Granting that he did occupy a dual relationship of debtor under his agreement and trust deed, and of trustee, for some purpose not at all clearly disclosed by the "declaration of trust," the latter instrument being made subsequently, and not being under seal was incompetent to vary the terms of his agreement and trust deed, both of which were sealed instruments. Besides, no authority to the persons who subscribed their names to the "declaration of trust," with the affix of "Pres." and "Sec.," respectively, is shown to have been conferred upon them by the appellee to do any such act, and we can not presume such authority to exist.

The indebtedness due to appellant on account of the eight matured shares of stock was applied by the appellee on the indebtedness secured by the trust deed, as was appellee's right to do, and the amount of the decree was lessened by that much, and we see no ground for complaint by appellant in that regard.

We discover no substantial error or inequity in the decree. If appellant has been placed in a position different from what he intended, it can not be said that it is because of the fault of anybody but himself.

The assigned and argued error, that the decree was for the sale of property not in controversy, remains to be considered. Appellant's abstract of the bill is limited to the words: "Bill to foreclose trust deed and copy of instruments." His abstract of the decree shows that thereby a sale was ordered of "Lot 53 in William S. Sampson's subdivision of block 10, in Sampson & Green's addition to Chicago being a subdivision of N. W. $\frac{1}{4}$, Sec. 20, T. 39 N., R. 14."

There is nowhere in the abstract—and not even in appellant's brief—any description or statement of the mortgaged premises, if they be any different from those so described in the decree, and following our rule, and that of the Supreme Court, so often enforced, that reference to the cases is no longer necessary, we will not hunt through the tran-

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script to find facts to support, or refute, the assigned error. But if it be assumed that the mortgaged premises were the same as those described in the "declaration of trust," and if, as stated in appellant's brief, the decree was amended after this appeal was allowed and the appeal bond filed, by substituting for the premises described in the decree those described in the bill, it was properly done.

Such amendment from matter appearing upon the record may be made after the filing of an appeal bond. *Richardson v. Mills*, 66 Ill. 525; *Heintz v. Pratt*, 54 Ill. App. 616; *Seeley v. Pelton*, 63 Ill. 101.

The motion to tax the costs of appellees' abstract against the appellant is denied. We have not found it necessary to refer to such additional abstract.

The decree is affirmed.

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